Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

ANTHONY GADOMSKI,

Petitioner,

v.

PAUL RENICO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case raises the question reserved by the Supreme Court in Coleman v. Thompson, 501 U.S. 722 (1991): Whether there is a limited constitutional right to counsel during state collateral review "in those cases where state collateral review is the first place a prisoner can present a challenge to his conviction?" Id. at 755.

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The Petitioner is not a corporation.

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PETITION FOR WRIT OF CERTIORARI

Anthony Gadomski, a Michigan inmate, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit rejecting his claims for habeas corpus relief.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported as Gadomski v. Renico, 258 Fed. Appx. 781 (6th Cir. 2007). Pet. App. 2a-10a. The opinion of the Eastern District of Michigan is unreported. Pet. App. 10a-35a.

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit was issued on December 20, 2007. A Petition for Rehearing En Banc was timely filed on January 2, 2008. The Petition was denied on April 10, 2008. Pet. App. 1a–2a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides in relevant part:

In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence.

The Fourteenth Amendment to the Constitution of the United States provides in relevant part:

No State shall . . . deprive any person of life, liberty, or property, without due process of law.

INTRODUCTION

Anthony Gadomski was convicted and sentenced to prison despite a court bailiff's improper communication with the jury during deliberations—an event that the State of Michigan does not deny took place and a plain violation of Remmer v. United States, 347 U.S. 227 (1954). Gadomski's trial, appellate, and postconviction relief counsel all failed to raise the Remmer issue. The State's position—and the result achieved by the Sixth Circuit's decision in this case—is that a meritorious constitutional claim that slips by three ineffective lawyers (two of whom were appointed by the State) is forever lost because there is no remedy for ineffective assistance of appellate counsel, a right guaranteed by the Sixth Amendment. The result effectively resolves the conflict between two lines of this Court's jurisprudence without ever acknowledging the conflict exists or giving the conflict the consideration it is due.

This Court has clearly reasoned that when a criminal defendant has already had the benefit of effective assistance of counsel to bring a claim, he has no constitutional right to counsel in state postconviction proceedings. Pennsylvania v. Finley, 481 U.S. 551 (1987); Coleman v. Thompson, 501 U.S. 722 (1991). Thus, in that circumstance, ineffective assistance of state postconviction counsel cannot serve as the cause to excuse a failure to exhaust a claim in earlier proceedings.

But equally clear, neither Finley nor Coleman necessarily bar the right to postconviction counsel when state postconviction proceedings are a defendant's first chance to raise a constitutional

claim. Indeed, in Douglas v. California, 372 U.S. 353 (1963), this Court held that the Constitution guarantees the right to appellate counsel, reasoning that "where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor." Id. at 357. Where Douglas suggests the Constitution grants the right to counsel for the "one and only" forum in which the ineffective assistance of appellate counsel can be raised, Finley suggests otherwise. Coleman recognized this nuance, specifically reserving that issue for another day.

Here, Gadomski's first opportunity to raise his ineffective assistance of appellate counsel claim was in state postconviction proceedings. Gadomski's case ought to be resolved by resolving the inherent conflict in the reasoning of Douglas and Finley. Instead, the lower courts have avoided the issue.

To be sure, other lower courts have reached the same result that the Sixth Circuit reached here, but they have offered varying and conflicting approaches. Many incorrectly conclude that Coleman, or Finley before it, actually answered the question. Others recognize that approach to be wrong, but even these courts are split in how they resolve the question. Some feel bound by their own prior precedent broadly denying any right to counsel in state postconviction proceedings (regardless of whether postconviction proceedings are the petitioner's first opportunity to raise constitutional challenges). One court has answered the question on "practical" grounds, determining wrongly that there can be no right to counsel during state postconviction proceedings, even

when that is a criminal defendant's first opportunity to bring a claim, because granting any such right would be a slippery slope that gives too much away. Others, even with the power to decide the question anew, find that only this Court can provide the answer to Coleman's question.

Until this Court answers the Coleman question, the lower courts will continue to be bound by their own precedent. Mr. Gadomski's case provides the vehicle necessary to answer the question once and for all.

For these reasons, the Court should grant certiorari to decide, once and for all, the question it left unanswered in Coleman.

STATEMENT OF THE CASE

Mr. Gadomski was convicted of criminal sexual conduct and felonious assault by a Michigan jury on June 11, 1996. During deliberations, the bailiff engaged in ex parte communications with the jury and took unidentified documents into the jury room, without any request from the jury. Trial counsel did not question the bailiff's ex parte communications. Mr. Gadomski appealed his conviction. His court-appointed appellate attorney should have raised claims related to the ex parte communication with the jury and ineffective assistance of trial counsel but did not. Appellate counsel's failure to request an evidentiary hearing allowed by People v. Ginther, 212 N.W.2d 922, 925 (Mich. 1973) constituted ineffective assistance of appellate counsel. Michigan procedure requires ineffective assistance of appellate counsel to be raised in postconviction relief proceedings. Mr. Gadomski's postconviction relief counsel, however, failed to raise the claim.

On March 3, 2003, Mr. Gadomski filed a petition in the United States District Court for the Eastern District of Michigan requesting federal habeas relief based, in part, on ineffective assistance of appellate counsel. The district court concluded that this claim had not been exhausted in the state courts and was accordingly procedurally defaulted. After disposing of all of Mr. Gadomski's claims, the district court dismissed his petition with prejudice.

Without the aid of counsel, Mr. Gadomski sought, and obtained, a certificate of appealability from the Sixth Circuit. The Sixth Circuit appointed current counsel to represent Mr. Gadomski under the Criminal Justice Act, 18 U.S.C. § 3006A. Mr. Gadomski acknowledged that his claim was not exhausted in state court, but argued that the ineffectiveness of his postconviction relief counsel excused his failure to exhaust. Citing two prior Sixth Circuit decisions, a panel of the Sixth Circuit affirmed the district court's decision holding that Mr. Gadomski did not have a federal Constitutional right to the effective assistance of counsel at the postconviction relief stage.

REASONS FOR GRANTING THE WRIT

The question presented in this case is the very issue this Court reserved in Coleman: whether an inmate has a Constitutional right to the effective assistance of counsel during his first opportunity to raise a claim that his conviction and sentence were obtained in violation of his federal constitutional rights. Here, Mr. Gadomski's conviction and sentence were obtained in violation of his right to effective assistance of counsel during his trial and direct appeal and in violation of his right to a fair

trial free from ex parte communications between the bailiff and the jury. The State of Michigan has never disputed that the taint from these communications rendered Mr. Gadomski's trial constitutionally infirm. Rather, the State has steadfastly claimed that, because this violation slipped past the constitutionally ineffective attorneys provided by the State and his postconviction relief counsel, Mr. Gadomski unwittingly waived his right to a trial by a fair and impartial jury. This conclusion can only be reached if the right to effective assistance of counsel at trial and on direct appeal is a right without an effective remedy.

This Court has established that a defendant has a right to counsel during his first opportunity to make a constitutional claim challenging his conviction. See, e.g., Gideon v. Wainwright, 372 U.S. 335 (1963), and Douglas v. California, 372 U.S. 353 (1963). While the Court has declined to generally extend the right to counsel to *all* discretionary appeals and postconviction relief proceedings,[1] in Coleman v. Thompson, the Court reserved the question of whether the right to counsel in postconviction relief proceedings existed where collateral review is the first instance in which a criminal defendant can present a constitutional challenge to his conviction. See 501 U.S. 722, 755 (1991) (stating that the Court need not address the issue of whether an exception to

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[1] See, e.g., Ross v. Moffitt, 417 U.S. 600, 615-16 (1974) (holding defendants not entitled to counsel on discretionary state court appeals); Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) (holding defendants have no general right to counsel at state post-conviction relief stage); Murray v. Giarratano, 492 U.S. 1, 10 (1989) (refusing to extend Douglas to postconviction relief proceedings for death row inmates).

Finley exists for cases where postconviction relief is the first opportunity for a prisoner to raise an ineffective assistance of counsel claim); see also Daniels v. United States, 532 U.S. 374, 387 (2001) (Scalia, J., concurring) (noting that the Court left open whether a defendant has a right to counsel for post-conviction proceedings that represent the defendant's first opportunity to raise a constitutional claim).

The state and lower courts have developed conflicting and varying approaches to answering the question that Coleman reserved. And, by relying on Coleman itself to dismiss out of hand any possible right to counsel in state postconviction proceedings in this case, the court below simply erred. This case presents a perfect opportunity for the Court to address the Coleman question and provide definitive guidance for state and lower courts as they face an issue certain to recur until it is settled by this Court.

A. The Decision Below Conflicts With This Court's Precedent Granting A Right To Counsel During A Defendant's First Opportunity To Raise A Constitutional Challenge To His Conviction.

Coleman correctly viewed the issue presented as an open one. It stands precisely at the point at which the holdings in Finley and Murray v. Giarratano, 492 U.S. 1 (1989), collide with Gideon and Douglas's guarantee of effective counsel during a defendant's first opportunity to present a constitutional challenge to his conviction.

These two lines of cases can be reconciled, for they rest on common premises that point the way to proper resolution of the factual situation

hypothesized in Coleman and actually presented in Mr. Gadomski's case.

The federal constitutional right of state criminal defendants to have the assistance of counsel at trial was founded on the "obvious truth" that although "our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law . . . [t]his noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him." Gideon, 372 U.S. at 344. The guarantee of counsel's assistance was extended to a first criminal appeal as of right in Douglas because "[t]here is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself," so that "the rich man has a meaningful appeal" while "[t]he indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual." 372 U.S. at 357-58. Trial and first-appeal counsel must be professionally competent, this Court has recognized, because of "the defendant's need for an attorney to meet the adversary presentation of the prosecutor" and because of a related aspect of counsel's role: "that of expert professional whose assistance is necessary in a legal system governed by complex rules and procedures for the defendant to obtain a decision at all—much less a favorable decision—on

the merits of the case." Evitts v. Lucey, 469 U.S. 387, 394 n.6 (1985).

There is, as Finley and the Giarratano plurality opinion teach, no general "constitutional right to appointed counsel in state postconviction proceedings," Finley, 481 U.S. at 557; Giarratano, 492 U.S. at 6-8 (plurality opinion of Chief Justice Rehnquist), just as there is no such right in discretionary criminal appeals beyond a first appeal as of right, see Ross v. Moffitt, 417 U.S. 600 (1974); Wainwright v. Torna, 455 U.S. 586 (1982).

But the line between trials and first appeals as of right, on the one hand, and subsequent discretionary review proceedings and collateral-attack proceedings, on the other, is not based on a distinction between proceedings that the Constitution itself requires and those that is does not. E.g., Evitts, 469 U.S. at 400-01 (accepting as a predicate the rule of McKane v. Durston, 153 U.S. 684 (1894), that "a State need not provide a system of appellate review as of right at all"). Instead, it is based on a *functional analysis* of the role that a lawyer can play, and of the services that a criminal defendant needs a lawyer to perform, in different sorts of proceedings. This analysis began in Ross v. Moffitt and was endorsed without significant change in Finley, Giarratano, and Coleman. The heart of it is an inquiry into the circumstances under which appointed counsel's assistance is and is not necessary "to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process." Finley, 481 U.S. at 556 (quoting Ross, 417 U.S. at 616).

As the Court has stated, "[t]he question is not one of absolutes, but one of degrees." Ross, 417 U.S. at 612. In Ross, the Court reasoned that North Carolina criminal defendants have no federal constitutional right to counsel in seeking discretionary state supreme court review of a conviction already affirmed by the State's intermediate appellate court. Such a defendant, the Court said,

> received the benefit of counsel in examining the record of his trial and in preparing an appellate brief on his behalf for the state Court of Appeals. Thus, prior to his seeking discretionary review in the State Supreme Court, his claims had 'once been presented by a lawyer and passed upon by an appellate court.' Douglas v. California, 372 U.S. at 356. We do not believe that it can be said, therefore, that a defendant in...[these] circumstances is denied meaningful access to the North Carolina Supreme Court simply because the State does not appoint counsel to aid him in seeking review in that court. At that stage he will have, at the very least, a transcript or other record of trial proceedings, a brief on his behalf in the Court of Appeals setting forth his claims of error, and in many cases an opinion by the Court of Appeals disposing of his case . . . .
>
> . . . Once a defendant's claims of error are organized and presented in a lawyer like fashion to the Court of Appeals, the justices of the Supreme Court of North Carolina who make the decision to grant or deny discretionary review should be able to ascertain whether his case satisfies the standards established . . . for such review.

417 U.S. at 614-15 (emphasis added). Ross thus relies heavily upon the rationale that once a criminal defendant has had the services of a competent lawyer to investigate and research his crucial claims, formulate them as a matter of legal theory, and articulate them in arguments that a court can grasp, the continued assistance of counsel in subsequent proceedings centered on those claims and their consequences is of greatly diminished importance. Finley repeated this rationale in refusing to extend the constitutional right to counsel in ordinary state postconviction proceedings,[2] and the Giarratano plurality opinion was informed by the same essential analysis.[3]

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[2] "[A] collateral attack . . . normally occurs only after the defendant has failed to secure relief through direct review of his conviction . . . .

". . . By the time respondent presented her application for postconviction relief, she had been represented at trial and in the Supreme Court of Pennsylvania. In Ross, we concluded that the defendant's access to the trial record and the appellate briefs and opinions provided sufficient tools for the pro se litigant to gain meaningful access to courts that possess a discretionary power of review. . . . We think that the same conclusion necessarily obtains with respect to postconviction review." 481 U.S. at 557 (citation omitted).

[3] The plurality opinion in Giarratano assumes throughout that a state-condemned inmate will have had the assistance of competent counsel in preparing and presenting his case at trial and on direct appeal. "[I]n Barefoot v. Estelle, 463 U.S. 880, 887 (1983), we observed that 'direct appeal is the primary avenue for review of a conviction or sentence, and death penalty cases are no exception.'

"...If, as we said in Barefoot v. Estelle, supra, direct appeal is the primary avenue for review of capital cases as well as other sentences, Virginia may quite sensibly decide to concentrate the

It is scant wonder, then, that Coleman saved for another day whether Finley and Giarratano applied when a defendant who has never had the assistance of a competent lawyer to defend him tries to raise a claim in the first forum in which the state permits the claim to be presented. For the investigation, research, formulation, and presentation of such a claim is palpably "governed by intricate rules that to a layperson would be hopelessly forbidding." Evitts, 469 U.S. at 396. Establishing ineffective assistance of counsel during trial and direct appeal requires many of the fact-gathering, fact-presenting, and legal-reasoning skills that form the basis of the right to counsel in the first place.

Accordingly, the lower court's opinion cannot be rectified with the foundation for the right to counsel laid out in Gideon and Douglas and adhered to in Finley, Giarratano, and Coleman.

B. The State and Lower Courts Have Developed Conflicting and Varied Approaches to Answering Coleman's Open Question.

Faced with the open question in Coleman, the lower courts have predictably developed conflicting and varying approaches in resolving claims to the right to state postconviction counsel when it is the first opportunity to raise a constitutional challenge to conviction.

(continued...)

resources it devotes to providing attorneys for capital defendants at the trial and appellate stages of a capital proceeding. Capable lawyering there would mean fewer colorable claims of ineffective assistance of counsel to be litigated on collateral attack." 492 U.S. at 9-11.

Many lower courts have failed even to note the unresolved nature of the issue left open by Coleman, instead citing Finley or Coleman itself as the answer to the very question that Coleman specifically stopped short of answering. For example, in Henderson v. Sargent, 939 F.2d 586 (8th Cir. 1991), the court cited Coleman, with no further explanation, in vacating its own earlier decision finding that state habeas counsel had been ineffective for failing to raise ineffective assistance of trial/appellate counsel. Id. at 586.[4] These decisions, in turn, have become the type of circuit precedent that allow later panels and district courts, including the court below, to reject claims raising the reserved issue in Coleman without even mentioning it. See Pet. App. at 8a.[5]

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[4] See also, e.g., Johnson v. Singletary, 938 F.2d 1166, 1175 (11th Cir. 1991) (citing Coleman to reject cause-and-prejudice exception to procedural default based on state habeas counsel's failure to raise ineffective assistance of trial counsel); Gulertekin v. Tinnelman-Cooper, 340 F.3d 415, 425-26 (6th Cir. 2003).

[5] See also, e.g., Ogan v. Cockrell, 297 F.3d 349, 356-57 (5th Cir. 2002); In re Goff, 250 F.3d 273, 276 (5th Cir. 2001); Weeks v. Angelone, 176 F.3d 249, 273-74 (4th Cir. 1999); Jones v. Johnson, 171 F.3d 270, 277 (5th Cir. 1999) (en banc); Quesinberry v. Taylor, 162 F.3d 273, 276 (4th Cir. 1998); Parkhurst v. Shillinger, 128 F.3d 1366, 1371-72 (10th Cir. 1997); Smith v. Angelone, 111 F.3d 1126, 1133 (4th Cir. 1997); Pitsonbarger v. Gramley, 103 F.3d 1293, 1298 (7th Cir. 1996); Irving v. Hargett, 59 F.3d 23, 26 (5th Cir. 1995); Johnson v. Hargett, 978 F.2d 855, 857-59 (5th Cir. 1992); Cornman v. Armontrout, 959 F.2d 727, 730 (8th Cir. 1992); Saahir v. Collins, 956 F.2d 115, 118 (5th Cir. 1992); Cutshaw v. Lewis, No. 2:04-CV-279, 2007 U.S. Dist. LEXIS 75128, at *34 (E.D. Tenn. Oct. 9, 2007); Stokely v. Schiriro, No. CV-98-332, 2006 U.S. Dist. LEXIS 62481, at *53-54 (D. Ariz. Aug. 30, 2006); Mustard v. Erwin, Nos. 2:05-cv-594, 647, 2006 U.S. Dist. LEXIS 17000, at *10 (S.D. Ohio Jan. 18, 2006); Macey v. Kyler, No. 00-3410, 2003

Other federal courts, however, offer conflicting analysis, departing from the approach above and recognizing that Coleman does not answer—but instead asks—the question at hand. In attempting to answer the question, these courts largely split into three distinct camps.

First, some courts recognize the open issue, noting that the defendant's argument is "not without force," Nevius v. Sumner, 105 F.3d 453, 460 (9th Cir. 1996), but find that they are "foreclosed by [circuit] precedent from considering whether an exception exists under the Coleman rule," Martinez v. Johnson, 255 F.3d 229, 240 (5th Cir. 2001).[6] The frequency of these cases, along with those cases in which courts summarily deny relief without mentioning the Coleman question, reveal that the issue routinely

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(continued...)

U.S. Dist. LEXIS 2782, at *13-14 (D. Conn. Feb. 21, 2003); United States ex rel. Weston v. Clark, 101 F. Supp. 2d 685, 690 (N.D. Ill. 2000); Alley v. Bell, 101 F. Supp. 2d 588, 632-33 (W.D. Tenn. 2000); Roberts v. Bowersox, 61 F. Supp. 2d 896, 916-17 (E.D. Mo. 1999); United States ex rel. Rhoads v. Barnett, 22 F. Supp. 2d 765, 770-72 (N.D. Ill. 1998); Lambright v. Lewis, 932 F. Supp. 1597, 1565 (D. Ariz. 1996); Waring v. Delo, No. 91-0893-cv-w-6, 1992 U.S. Dist. LEXIS 6241, at *15 (W.D. Mo. May 6, 1992).

[6] See also, e.g., Burns v. Gammon, 173 F.3d 1089, 1092 (8th Cir. 1999) ("Whether that situation should be carved out of the Coleman rule was a question not addressed in Coleman itself. This Court, however, has addressed it."); Murden v. Artuz, 497 F.3d 178, 194 (2d Cir. 2007), cert. denied, __ U.S. __, 128 S. Ct. 1083 (2008); Abdus-Samad v. Bell, 420 F.3d 614, 632 (6th Cir. 2005); Ellis v. Armenakis, 222 F.3d 627, 633 (9th Cir. 2000); Bonin v. Calderon, 77 F.3d 1155, 1159-60 (9th Cir. 1999); Hill v. Jones, 81 F.3d 1015, 1025–26 (11th Cir. 1996); Nolan v. Armontrout, 973 F.2d 615, 617 (8th Cir. 1992).

arises and is worthy of final consideration by the Court.

Second, other courts recognize the open issue in Coleman, but nonetheless declare that Coleman bars the right to counsel until this Court, and only this Court, determines otherwise. In Mackall v. Angelone, 131 F.3d 442 (4th Cir. 1997), the Fourth Circuit, sitting en banc, resolved the issue simply by holding that to recognize a right to counsel for claims the petitioner can only raise in the first instance in post-conviction proceedings would contradict "the explicit holding of Finley that no constitutional right to counsel exists in collateral review." Id. at 449. The Fourth Circuit concluded that, "[a]s an inferior appellate court, we are not at liberty to disregard this controlling authority." Id.[7] However, if Finley indeed had created controlling precedent on point, there would have been no need for this Court to recognize after Finley that the question is still unresolved.

Third, one court, the Ninth Circuit, has recognized the open issue and summarily addressed it on the merits. In Bonin v. Vasquez, 999 F.2d 425 (9th Cir. 1993), the appellate court rejected the petitioner's argument that he had a right to counsel during his state habeas proceeding because that was the first forum in which he could raise his ineffective assistance of counsel claim. Id. at 429. The Ninth Circuit based its holding on the "practical" implications of recognizing a limited right to counsel in state postconviction proceedings. Specifically, the

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[7] See also Deegan v. State, 711 N.W.2d 89, 96-97 (Minn. 2006) (recognizing the tension between Douglas and Finley, but deferring to the United States Supreme Court to resolve the conflict between the two cases).

Ninth Circuit reasoned that if it allowed a right to counsel in the first state postconviction proceeding to raise ineffective assistance of trial/appellate counsel, then it would have to allow a right to counsel in every step thereafter to challenge the efficiency of counsel in the previous step. For reasons discussed infra, the Ninth Circuit's reasoning was flawed.[8]

In sum, while some courts fail to recognize an open question after Coleman, most of those that do find themselves bound by prior (and often inapposite) precedent or determine that only this Court can answer the question it raised. Indeed, the one court to address the issue on the merits took a pragmatic approach that does not withstand scrutiny and is devoid of any grounding in the due process and equal protection bases for the right to effective counsel in the first place. In the end, the panoply of state and lower court decisions reveal that only this Court can effectively determine whether criminal defendants have a right to effective counsel in state habeas proceedings when given their first opportunity to raise a constitutional challenge to their convictions.

C. The Decision Below is in Error.

Even if the lower court's opinion does not directly conflict with Gideon and Douglas, for many of the reasons above, it still represents an erroneous over-extension of Finley's limits on the right to counsel, resulting in keeping Mr. Gadomski in prison without

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[8] Two years later, a plurality of an en banc Ninth Circuit panel in Jeffers v. Lewis affirmed Bonin's holding that "a defendant has no Sixth Amendment right to counsel during his state habeas proceedings even if that was the first forum in which he could challenge constitutional effectiveness on the part of trial counsel." 68 F.3d 299, 300 (9th Cir. 1995).

ever having been able to raise his so-far uncontested Remmer claim. In sum, navigating the criminal justice system without an attorney is a "perilous endeavor for a layperson." Halbert v. Michigan, 545 U.S. 605, 621 (2005). The system is fraught with pitfalls that can trap the inexperienced and untrained and lead to the waiver of meritorious claims. Id. at 621-22. For these reasons, the Constitution recognizes that criminal defendants cannot be assured a fair trial and appeal without effective assistance of counsel. Evitts, 469 U.S. at 397. Consistent with Gideon and Douglas, this right should apply to a post-conviction relief proceeding where it is the first opportunity for a defendant to raise an ineffective assistance of appellate counsel claim. Nothing in Finley, Giarratano, or Coleman precludes recognizing the limited right to counsel Mr. Gadomski seeks here. Rather, Coleman invited this possible conclusion.

The lower court's one-line dismissal of the right-to-counsel question leaves nothing more to say to refute its reasoning. Nor can the lower court's opinion be affirmed on the only grounds on which a court *has* answered the Coleman question on its merits: the Ninth Circuit's pragmatic point that granting a limited right to counsel in state habeas proceedings for first-opportunity claims would lead to an endless right to challenge the effectiveness of counsel in the step immediately preceding. For one, while this pragmatic approach may have its efficiency benefits, that is never itself a sufficient basis for determining the bounds of constitutional rights. And as for the due-process and equal-protection bases for a defendant's right to counsel in first-opportunity

situations, the Ninth Circuit approach has no answer whatsoever.

The limit of the right to counsel is not answered by asking: In what proceeding is the defendant engaged? Rather, the answer requires an inquiry into the circumstances under which appointed counsel's assistance is and is not necessary "to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process." Finley, 481 U.S. at 556 (quoting Ross, 417 U.S. at 616). A claim of ineffective assistance of counsel at trial or appeal is beyond the scope of the trial and direct appeal because it requires developing and evaluating facts outside of the record of the trial and appeal. Likewise, such a claim requires the same skills that form the basis of the right to counsel in trial and direct appeal. Accordingly, drawing a pragmatic line may help with efficiency but it runs afoul of the way this Court determines the bounds of the right to counsel in the first place.

Moreover, it is not, as the Ninth Circuit surmised, necessary to extend an endless right to counsel in the same breath as extending the limited right to counsel to make first-opportunity claims in state habeas relief. Rather, even if a pragmatic approach is necessary to answer the Coleman question, the line should be drawn, and could as easily be drawn, after the first non-discretionary stage after direct appeal, i.e., in Gadomski's case, immediately after his first state postconviction proceeding. This is the only way to give full effect to the well-established right to effective counsel at trial and on direct appeal. It would allow future counsel to claim ineffective

assistance of trial and appellate counsel even if counsel failed to do so during state postconviction proceedings. And while drawing the line after state postconviction proceedings or their equivalent may leave ineffective assistance of counsel during that stage without a remedy, it is still worth allowing this limited right for the purpose of preserving the ability to remedy the basic right to effective counsel during direct appeal. Rather than drawing the line immediately after direct appeal, as the Ninth Circuit did, it is far more pragmatic and effective to draw any necessary line one step further in the process, to give full effect to the right to counsel that already is beyond question. That result, and only that result, provides an effective remedy for ineffective assistance of appellate counsel. Any other result strips Douglas of its meaning.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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July 9, 2008

APPENDIX

Nos. 05-1207/05-1418

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ANTHONY GADOMSKI,

Petitioner-Appellant,

v.

PAUL RENICO, WARDEN,

Respondent-Appellee,

LAWRENCE EARL GADOMSKI,

Petitioner-Appellant,

v.

LOUELLA BURKE, WARDEN,

Respondent-Appellee.

ORDER

BEFORE: SILER, GIBBONS, and MCKEAGUE, Circuit Judges.

Filed April 10, 2008.

Upon consideration of the motion to withdraw the petition for rehearing en banc filed by Tracy K. Stratford and Matthew P. Silversten on behalf of Lawrence Gadomski only, and to file petition for rehearing en banc submitted by Lawrence Gadomski,

It is ORDERED that the motion be and it hereby is DENIED.

The petition for rehearing en banc from Tracy K. Stratford and Matthew P. Silversten, having been circulated not only to the original panel members but also to all other active* judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en bane, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

*Judge Sutton recused himself from participation in this ruling.

United States Court of Appeals, Sixth Circuit.

Anthony GADOMSKI, Petitioner-Appellant,

v.

Paul RENICO, Warden, Respondent-Appellee.

Lawrence Earl Gadomski, Petitioner-Appellant,

v.

Louella Burke, Warden, Respondent-Appellee.

Nos. 05-1207, 05-1418.

Dec. 20, 2007.

On Appeal from the United States District Court for the Eastern District of Michigan.

BEFORE: SILER, GIBBONS, and McKEAGUE, Circuit Judges.

OPINION

McKEAGUE, Circuit Judge.

**1

In this consolidated appeal, brothers Anthony and Lawrence Gadomski appeal the district court's dismissal of their habeas petitions. For the reasons set forth below, we affirm.

I

A Michigan jury convicted the brothers of various offenses related to the rape of a woman. Both Petitioners appealed to the Michigan Court of Appeals and sought leave to appeal to the Michigan Supreme Court, all of which were denied. They then returned to the trial court and filed a joint motion for

relief from judgment. The trial court denied their motion. Petitioners appealed the denial to the Michigan Court of Appeals and Michigan Supreme Court, raising some, but not all, of the claims they raised in their motion for relief from judgment. The state courts denied their appeal.

The Gadomskis then filed their petitions for habeas corpus in the Eastern District of Michigan. They raised both exhausted and unexhausted claims. On the exhausted claims, the district court dismissed one of them on the merits, another as not cognizable, and the rest as procedurally defaulted. On the unexhausted claims, the district court determined that Petitioners had no available state remedy and treated the claims as procedurally defaulted. After finding that they could not show cause and prejudice, the district court dismissed all of the defaulted claims with prejudice.

Petitioners appealed.

II

Pursuant to 28 U.S.C. § 2253(c), a judge of this circuit granted Petitioners certificates of appealability on a single question: whether the district court should have dismissed their petitions without prejudice so that they could return to state court to exhaust any unexhausted claims? "[T]he court of appeals will not entertain any issue that lacks district court or court of appeals certification." In re Certificates of Appealability, 106 F.3d 1306, 1308 (6th Cir. 1997). However, "all arguments relevant" to the certified question "are properly before this court." Cowherd v. Million, 380 F.3d 909, 911-12 (6th Cir. 2004).

On appeal, Petitioners focus on a single claim: whether the bailiff violated their right to a fair trial and an impartial jury by taking evidence into the jury room during deliberations. In support, they rely upon Remmer v. United States, where the Supreme Court held that "any private communication, contact, or tampering ... with a juror" is "presumptively prejudicial" unless if made in accordance with court rules, with court approval, and with full knowledge of the attorneys. 347 U.S. 227, 229, 74 S.Ct. 450, 98 L.Ed. 654 (1954). *783

There is no dispute that Petitioners did not raise this claim before either the Michigan Court of Appeals or Michigan Supreme Court in either their direct appeals or on collateral review. In that sense, the claim remains unexhausted. Baldwin v. Reese, 541 U.S. 27, 32, 124 S.Ct. 1347, 158 L.Ed.2d 64 (2004); O'Sullivan v. Boerckel, 526 U.S. 838, 845, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999).

We next consider whether Petitioners have any available state court remedies left to them. See 28 U.S.C. § 2254(b)(1), (c). If so, the claim should be dismissed without prejudice so that they can pursue those remedies. Coleman v. Thompson, 501 U.S. 722, 731, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). If not, we must treat the claim as procedurally defaulted. Gray v. Netherland, 518 U.S. 152, 161-62, 116 S.Ct. 2074, 135 L.Ed.2d 457 (1996); Rust v. Zent, 17 F.3d 155, 160 (6th Cir.1994).

**2

Under Michigan Court Rule ("MCR") 6.502(G), a defendant cannot file a second or subsequent motion for relief from judgment in state trial court unless the defendant can show either a retroactive change in the

law or new evidence that was not discovered before the first motion. Petitioners do not point to any retroactive change in the law, but instead rely upon the second avenue to support their Remmer claim.

Petitioners' argument suffers from two fundamental defects. First, they proffer no new evidence to support a second motion. Second, and related, it is clear that the evidence they do have has been known to them since their trial and sentencing. Anthony Gadomski made reference to the matter during a statement he prepared for his sentencing hearing. Adela Gadomski stated in an affidavit that she "witnessed the Bailiff take unknown documents/evidence into the Jury Room during deliberations of the above cited cases." We agree with the reasoning of the court in Banks v. Jackson, where it found that Michigan's court rules impose "a diligence, or constructive discovery, requirement" for second or successive motions brought under MCR 6.502 based solely on a claim of new evidence. 149 Fed.Appx. 414, 419 n. 4 (6th Cir.2005) (citing Souter v. Jones, 395 F.3d 577, 583 (6th Cir.2005) (concluding that the Michigan trial court, affirmed on appeal, denied a petitioner's MCR 6.502 motion because the purportedly new evidence "could have been presented at trial and did not demonstrate a reasonably likely chance of acquittal")); see also MCR 6.502 1989 staff cmt. ("The motion is to list all grounds for relief of which defendant has knowledge or with reasonable diligence should have knowledge."). Had the Gadomski brothers used reasonable diligence, they could have pressed their trial counsel or appellate counsel to look into the matter further, including requesting an evidentiary hearing. Even if their counsel refused, they could have raised their partially

developed claim on direct appeal in a Standard 11 (called Standard 4 since 2004) pro se brief permitted under state criminal procedure. See People v. Scott, 474 Mich. 1012, 708 N.W.2d 372, 373 (2006) (Young, J., concurring) ("Administrative Order No. 2004-6, Standard 4, allows a defendant to file a brief in propria persona, raising issues that the defendant's attorney does not believe are meritorious."). Finally, they could have pursued the claim on collateral review. Having passed up all of these avenues to develop their claim, it is clear that they are foreclosed under state law from doing so now.

III

Petitioners try to get around the lack of any new evidence by arguing that their attorneys have been ineffective at each stage of their state court proceedings. They were both represented by counsel at trial, different counsel on direct appeal, and new counsel retained by their family *784 on their collateral motion. Had their attorneys raised the claim, sought discovery, and requested a hearing, Petitioners could have discovered new evidence to show a violation of their right to a fair and impartial jury, they contend.

**3

However, Petitioners still have not shown that they have any available remedies to them in state court. As discussed above, they cannot show that they have an available remedy under MCR 6.502(G) based on new evidence and are therefore precluded from bringing a second motion for relief from judgment under that subsection. There is some question whether they could bring a second motion by relying upon MCR 6.508(D)(3), which provides that a state

court may not grant relief to a defendant on a motion for relief from judgment based on grounds, "other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion ... unless the defendant demonstrates" cause and prejudice. Compare Dorch v. Smith, 105 Fed.Appx. 650, 656 (6th Cir.2004) (concluding that the petitioner was precluded by MCR 6.502(G) from bringing a second motion for relief from judgment in Michigan court to pursue an unexhausted claim), with People v. Clark, 274 Mich.App. 248, 732 N.W.2d 605, 607-08 (2007) (noting that the defendant had "filed both an appeal and prior motions for relief from judgment" and addressing whether the defendant could meet the cause and prejudice requirement of MCR 6.508(D)(3) in "a subsequent motion for relief from judgment"), and People v. Islam, No. 257288, 2005 WL 3304105, at *1 (Mich.Ct.App. Dec. 6, 2005) (explaining that in a " first post-conviction motion" the "cause and prejudice" requirement of MCR 6.508(D)(3) does not apply, thereby implying a second motion would have to meet that requirement (emphasis added)). Assuming arguendo that a state trial court could consider a second motion by Petitioners grounded on their Remmer claim, it is clear that they cannot show cause for their failure to raise it in their first motion by relying upon the purported ineffective assistance of counsel. They have defaulted any claim of ineffective assistance of counsel during the trial or on direct appeal by not pursuing it on collateral review. As to their counsel on collateral review, there is no right under the federal Constitution to the effective assistance of collateral counsel, Abdus-Samad v. Bell, 420 F.3d 614, 632 (6th Cir.2005), cert. denied, --- U.S.

----, 127 S.Ct. 380, 166 L.Ed.2d 269 (2006); Gulertekin v. Tinnelman-Cooper, 340 F.3d 415, 425-26 (6th Cir.2003), and Petitioners have pointed to no other means to establish cause under MCR 6.508(D)(3).

IV

Accordingly, we hold that Petitioners have no available remedy in state court for their Remmer claim. The district court properly treated the claim as procedurally defaulted rather than unexhausted. Finding no error with the district court's dismissal of the claim on the merits, we AFFIRM.

United States District Court

Eastern District of Michigan

Southern Division

LAWRENCE EARL GADOMSKI, Petitioner,

v.

LUELLA BURKE, Respondent.

Case Number: 03-70860

HON. NANCY G. EDMUNDS

ANTHONY GADOMSKI, Petitioner,

v.

PAUL RENICO, Respondent.

Case Number: 03-70859

HON. NANCY G. EDMUNDS

OPINION AND ORDER DENYING PETITIONS FOR WRITS OF HABEAS CORPUS

Petitioners Lawrence Earl Gadomski and Anthony Gadomski, through their attorney, have each filed petitions for writs of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner Lawrence[9] is currently incarcerated at the Saginaw Correctional Facility in Freeland, Michigan pursuant to a 1996 conviction of first-degree criminal sexual conduct. Petitioner Anthony is incarcerated at the Muskegon

[9] To avoid confusion, the court shall refer to Petitioners by their first names.

Correctional Facility in Muskegon, Michigan, pursuant to 1996 convictions for two counts of first-degree criminal sexual conduct and one count of felonious assault.

Because Petitioners' convictions arise out of the same incident and their petitions present nearly identical claims, the Court addresses the petitions in this joint opinion.

I. Facts

The Michigan Court of Appeals summarized the facts giving rise to Petitioners' convictions as follows:

> At trial, the victim testified that late on the evening of December 14, 1995, defendant Anthony Gadomski, an acquaintance of hers, entered her house uninvited through the bathroom window and proceeded to let his brother, defendant Lawrence Gadomski, and an unidentified third person in through the back door. After defendant Anthony Gadomski informed the victim that her incarcerated boyfriend owed him $10,000, he and his brother spent the remainder of the night forcing her to engage in various sexual acts and helping themselves to her food and drink. Once during the night, defendant Anthony Gadomski threatened the victim by holding a kitchen knife to her neck. Defendants left the victim's house on the following morning, taking some of her property with them. Defendant Anthony Gadomski testified that he was invited into the victim's house and that he and the victim engaged in consensual sex. Defendant Lawrence Gadomski did not testify.

People v. Gadomski, 232 Mich. App. 24, 27 (Mich. Ct. App. 1999).

II. Procedural History

Petitioners Lawrence and Anthony were tried in a joint trial before a single jury in St. Clair County Circuit Court. Petitioner Lawrence was charged with four counts of first-degree criminal sexual conduct, assault with intent to commit great bodily harm, one count of second-degree criminal sexual conduct, and being a habitual offender, fourth. Following a jury trial in St. Clair County Circuit Court, Petitioner Lawrence was convicted of one count of first-degree criminal sexual conduct. On July 1, 1996, he was sentenced as a fourth habitual offender to twenty to sixty years imprisonment.

Petitioner Anthony was charged with three counts of first-degree criminal sexual conduct, two counts of aiding and abetting first-degree criminal sexual conduct, assault with a dangerous weapon, and home invasion. Petitioner Anthony was convicted of two counts of first-degree criminal sexual conduct and one count of felonious assault. On July 1, 1996, he was sentenced as a second habitual offender to twenty-five to sixty years imprisonment for each of the first-degree criminal sexual conduct convictions and two to six years imprisonment for the felonious assault conviction.

Petitioners each filed appeals of right in the Michigan Court of Appeals. The appeals were consolidated. Petitioner Lawrence presented the following claims in his appeal of right:

I. Did the trial court abuse its discretion by denying appellate counsel's motion for new trial because defendant Lawrence Gadomski's

guilty verdict is against the "great weight of the evidence?"

II. Was Mr. Gadomski deprived of his state constitutional rights to a properly instructed jury?

III. If trial counsel waived the instructional error by failing to object, did his failure deprive Mr. Gadomski of his state and federal constitutional rights to effective assistance of counsel?

IV. Did the trial court abuse its discretion by permitting the prosecution's late endorsement of a key witness after the defense had committed itself to the position that such a third person did not exist?

Petitioner Anthony presented the following claims in his appeal of right

I. Defendant's state and federal constitutional rights to a unanimous verdict were violated where the jury was instructed on Counts III and V in such a way as to permit a guilty finding without unanimity on one of the essential elements.

II. Defendant's state and federal rights to a fair were denied where the prosecution was allowed to endorse a new witness in the middle of trial without making a showing of good cause.

III. Defendant was denied his state and federal rights to effective assistance of counsel where his attorney failed to submit proposed jury instructions and failed to object to erroneous instructions used by the court.

The Michigan Court of Appeals affirmed the convictions. People v. Gadomski, 232 Mich. App. 24 (Mich. Ct. App. 1998).

Petitioners then sought leave to appeal in the Michigan Supreme Court, presenting the same claims presented to the Michigan Court of Appeals. The Michigan Supreme Court denied leave to appeal. People v. Gadomski, No. 113568 (Mich. May 25, 1999).

Petitioners then filed a joint motion for relief from judgment in the trial court, presenting the following claims:

I. Defendants were denied their right to a fair trial guaranteed by the United States and State constitutions when the jury instructions erroneously failed to require (the jury) to unanimously determine which of the three aggravating factors existed in support of the first degree criminal sexual conduct [convictions]. A new trial must be granted.

II. There was insufficient evidence of penetration of Ms. Betz with a taco sauce bottle to substantiate Lawrence Gadomski's conviction. The conviction must be reversed and a new trial ordered.

III. The trial court's allowance of the late endorsement of Dale Smith, a res gestae witness, was an abuse of discretion which violated both Anthony and Lawrence Gadomski's state and federal due process rights to a fair trial, effective assistance of counsel and rights of confrontation of witnesses. A new trial must be granted.

IV. The trial judge sped up the trial violating defendant's state and constitutional rights to a fair trial and deliberative jury.

V. Defendant Lawrence and Anthony Gadomski's sentences were disproportionate to the seriousness of the offenses and to the dangerousness of the offenders. Being entitled to correct sentences pursuant to their rights under the United States Constitution, defendants must be resentenced.

VI. Ineffective assistance of counsel.

Petitioners also filed a Motion to Enlarge the Record and request for an evidentiary hearing. On April 2, 2001, the trial court issued an Order Denying Defendants' Motion for Relief from Judgment. People v. Gadomski, No. 96-000673-FC (St. Clair County Circuit Court Apr. 2, 2001). In the same order, the trial court denied the Motion to Enlarge the Record and request for an evidentiary hearing. Id.

Petitioners then filed applications for leave to appeal the trial court's denial of the motion for relief from judgment in the Michigan Court of Appeals. Petitioner Lawrence presented the following claim:

> Was there sufficient evidence of penetration of Ms. Betz with a taco sauce bottle to substantiate Lawrence Gadomski's conviction?

The Michigan Court of Appeals denied leave to appeal. People v. Gadomski, No. 240438 (Mich. Ct. App. July 3, 2002).

Petitioner Anthony presented the following claims in his application for leave to appeal to the Michigan Court of Appeals:

I. Was there sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt?

II. Did defendant show his rights to a fair trial were prejudiced by joinder of both defendants cases?

III. Did defendant suffer prejudice as a result of the judge's absence in order to reverse a conviction?

IV. Did defendant show counsel's performance fell below the objective standard of reasonableness?

The Michigan Court of Appeals denied leave to appeal. People v. Gadomski, No. 240437 (Mich. Ct. App. July 3, 2002).

Petitioners then field a joint application for leave to appeal in the Michigan Supreme Court, presenting the following claims:

I. The trial judge committed prejudicial error by failing to give the complete set of instructions as to reasonable doubt and presumption of innocence when the jury sent out a note asking for the reasonable doubt instruction to be repeated.

II. Defendants were denied due process and suffered prejudice beyond a reasonable doubt when the trial judge left on vacation after the first day of jury deliberations, leaving a judge with no knowledge of the case to preside. Defendants suffered further prejudice beyond harmless error when the jury inadvertently overheard the trial judge tell defendants and counsel that he was leaving on vacation and

that if the jury did not reach a verdict by noon the next day they would be discharged.

III. There was insufficient evidence to support Anthony Gadomski's convictions of criminal sexual conduct or felonious assault. Moreover, Anthony Gadomski's convictions were against the great weight of the evidence. The convictions must be reversed and a new trial ordered.

IV. There was insufficient evidence of penetration of Ms. Betz with a taco sauce bottle to substantiate Lawrence Gadomski's conviction. The conviction must be reversed and a new trial ordered.

V. Defendants assert a unanimity instruction is required where several alternative criminal incidents are mentioned at trial; People v. Cooks, 446 Mich. 503 (1994). Defendants assert the jury was confused by the instructions which resulted in a compromise verdict.

VI. Manifest injustice occurred when trial counsel failed to object or request separated trials given the high probability of cross over (imputing) bad acts from one defendant to another.

VII. Defendants received ineffective assistance of counsel at various stages of the trial entitling them to a new trial. Anthony Gadomski received ineffective assistance of counsel by counsel's failure to argue that the court given an instruction that he and the victim engaged in purely consensual sex.

The Michigan Supreme Court denied leave to appeal. People v. Gadomski, Nos. 122217 & 122218 (Mich. Feb. 28, 2003).

Petitioners then each filed a petition for a writ of habeas corpus in this Court. Petitioners are represented by the same attorney and each asserts eight claims for habeas corpus relief, six of which are identical. The following claims are asserted in the petitions:

I. The trial judge committed prejudicial error by failing to give the complete set of instructions as to reasonable doubt and presumption of innocent when the jury sent out a note asking for the reasonable doubt instruction to be repeated.

II. Defendants were denied due process and suffered prejudice beyond a reasonable doubt when the trial judge left on vacation after the first day of jury deliberations, leaving a judge with no knowledge of the case to preside. Defendants suffered further prejudice beyond harmless error when the jury inadvertently overheard the trial judge tell defendants and counsel that he was leaving on vacation and that if the jury did not reach a verdict by noon the next day they would be discharged.

III.A. There was insufficient evidence to support Anthony Gadomski's convictions of criminal sexual conduct or felonious assault. Moreover, Anthony Gadomski's convictions were against the great weight of the

evidence. The convictions must be reversed and a new trial ordered.[10]

III.B. There was insufficient evidence of penetration of Ms. Betz with a taco sauce bottle to substantiate Lawrence Gadomski's conviction. The conviction must be reversed and a new trial ordered.[11]

IV. Defendants were denied their right to a fair jury trial guaranteed by the United States and State constitutions when the jury instructions erroneously failed to require (the jury) to unanimously determine which of the three aggravating factors existed in support of the first-degree criminal sexual conduct [convictions]. A new trial must be granted.

V. Joinder of both defendants' trial was improper. Manifest injustice occurred when trial counsel, respectively, failed to object or request separate trials given the high probability of cross over (imputing) bad acts from one defendant to another.

VI. The trial court's allowance of the late endorsements of Dale Smith, a res gestae witness, was an abuse of discretion and prejudicial to both Anthony and Lawrence Gadomski. A new trial must be granted.

VII.A Defendant Anthony Gadomski's sentence was disproportionate to the seriousness of the offense and dangerousness of the offender. He is entitled to be resentenced.[12]

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[10] This claim is asserted only in Petitioner Anthony's petition.

[11] This claim is asserted only in Petitioner Lawrence's petition.

[12] This claim is asserted only in Petitioner Anthony's petition.

VII.B Defendant Lawrence Gadomski's sentence was disproportionate to the seriousness of the offense and dangerousness of the offender. He is entitled to be resentenced.[13]

VIII. Defendants received ineffective assistance of counsel at various stages of the trial entitling them to a new trial.

Petitioners also filed *pro se* supplemental briefs presenting the following identical four issues:

I. Petitioner was denied his state and federal constitutional rights where the trial court abused its discretion throughout the trial; specifically during the deliberation and sentencing phases of Petitioner's trial.

II. Petitioner was denied his state and federal constitutional rights due to the prosecutor's misconduct throughout Petitioner's trial; specifically during the deliberation and sentencing phases of Petitioner's trial.

III. Petitioner was denied his state and federal constitutional rights when Petitioner's trial counsel failed in his duty to fully represent Petitioner before, during and after Petitioner's trial — specifically during the deliberation and sentencing phases of Petitioner's trial.

IV. Petitioner was denied his state and federal constitutional rights due to the ineffective assistance of appellate counsel during Petitioner's appeal of right.

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[13] This claim is asserted only in Petitioner Lawrence's petition.

III. Standard of Review

28 U.S.C. § 2254(d) imposes the following standard of review on federal courts reviewing applications for a writ of habeas corpus:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

28 U.S.C. § 2554(d). Therefore, federal courts are bound by a state court's adjudication of a petitioner's claims unless the state court's decision was contrary to or involved an unreasonable application of clearly established federal law. Franklin v. Francis, 144 F.3d 429 (6th Cir. 1998). Additionally, this Court must presume the correctness of state court factual determinations. 28 U.S.C. § 2254(e)(1)[14]; *see also* Cremeans v. Chapleau, 62 F.3d 167, 169 (6th Cir.

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[14] 28 U.S.C. § 2254(e)(1) provides, in pertinent part:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct.

1995) ("We give complete deference to state court findings unless they are clearly erroneous").

The United States Supreme Court has explained the proper application of the "contrary to" clause as follows:

> A state-court decision will certainly be contrary to [the Supreme Court's] clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases. . . .
>
> A state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from [the Court's] precedent.

Williams v. Taylor, 120 S. Ct. 1495, 1519-20 (2000).

With respect to the "unreasonable application" clause of § 2254(d)(1), the United States Supreme Court held that a federal court should analyze a claim for habeas corpus relief under the "unreasonable application" clause when "a state-court decision unreasonably applies the law of this Court to the facts of a prisoner's case." Id. at 1521. The Court defined "unreasonable application" as follows:

> [A] federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable. . .
>
> [A]n unreasonable application of federal law is different from an incorrect application of federal law. . . . Under § 2254(d)(1)'s "unreasonable application" clause, then, a federal habeas court

> may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

Id. at 1521-22.

With this standard in mind, the Court proceeds to the merits of the petition for a writ of habeas corpus.

IV. Analysis

A. Jury Instruction Claim

In their fourth claim for habeas corpus relief, Petitioners claim that the trial court committed prejudicial error when the court failed to require the jury to unanimously determine which of the three aggravating factors supported a first-degree criminal sexual conduct conviction.

The last state court to issue a reasoned opinion regarding this claim, the Michigan Court of Appeals, held, in pertinent part:

> [D]efendant[15] argues that he was denied his right to a unanimous jury verdict as a result of the trial court's instructions to the jury regarding the elements of CSC I. We disagree.

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[15] The Michigan Court of Appeals first addressed this claim as it related to Petitioner Lawrence. Thus, "defendant" in this section refers to Lawrence. The Michigan Court of Appeals did not discuss this issue separately with respect to Anthony. Instead, the state court stated, "for the reasons stated above, defendant Anthony Gadomski is not entitled to relief." Gadomski, 232 Mich. App. at 37.

A trial court is required to instruct the jury concerning the law applicable to the case and to fully and fairly present the case to the jury in an understandable manner. . . . In this case, the trial court instructed the jury that in order to find defendant guilty, it was required to find that defendant engaged in a specific act of sexual penetration alleged by the prosecution, and that this act was accompanied by one of three alternative aggravating circumstances. The aggravating circumstances made available for the jury's consideration included (1) that the act [occurred] during the commission of a home invasion, see M.C.L. 750.520b(1)(c);. . . (2) that it involved aiding and abetting and force or coercion, see M.C.L. 750.520b(1)(d)(ii); . . . and (3) that is caused personal injury to the victim and involved force or coercion, see M.C.L. 750.520b(1)(f). . . . The trial court also instructed the jurors, in general terms, that it was their job to decide the facts of the case, and that their verdict must be unanimous.

Defendant contends that the trial court should have instructed the jury that it was required to unanimously agree on the existence of at least one of the three aggravating circumstances alleged by the prosecution. He maintains that, because no special unanimity instruction was given, the jury might have unanimously agreed on the general existence of an aggravating circumstance without unanimously agreeing on the existence of any one of the aggravating circumstances in particular. Defendant failed to raise the issue at trial by requesting such an instruction or by objecting to the trial court's instructions on that basis.

Accordingly, our review is limited to the question whether relief is necessary to avoid manifest injustice. . . .

Criminal defendants are guaranteed a unanimous jury verdict under the state constitution. See Const. 1963, art. 1, § 14; People v. Cooks, 446 Mich. 503, 510-511; 521 N.W. 2d 275 (1994). Consequently, trial courts are required to give proper instructions regarding the unanimity requirement. Id. at 511. . .

Michigan criminal juries are not required to unanimously agree upon every fact supporting a guilty verdict. *See, e.g.*, People v. Espinosa, 142 Mich. App. 99, 105, 369 N.W.2d 265 (1985) (explaining that, in theory, a defendant could be convicted of murder by a jury in which six members were of the opinion that the defendant shot the victim acting as the principal, and the other six members were of the opinion that he aided and abetted another). More specifically, it is well settled that when a statute lists alternative means of committing an offense, which means in and of themselves do not constitute separate and distinct offenses, jury unanimity is not required with regard to the alternate theories. . . . That was the case here. Where there is a single sexual penetration, the various aggravating circumstances listed in M.C.L. § 750.520b; . . . constitute alternative means of proving a single CSC I offense, and would not support convictions of separate and distinct CSC I offenses. *See* People v. Willie Johnson, 406 Mich. 320, 330-31, 279 N.W.2d 534 (1979). Accordingly, defendant would have been properly convicted of CSC I even if some of [the] jurors believed that he committed the offense

> solely on the basis of another of the aggravating circumstances.
>
> In sum, we hold that when a defendant is tried on a charge of CSC I, and more than one aggravating circumstance is supported by the facts, it is not error for the trial court to instruct the jury, in the alternative, regarding each of the applicable aggravating circumstances alleged by the prosecution. [footnote omitted] In this case, because the trial court's instructions were legally correct, manifest injustice will not result from our failure to grant the relief requested.

Gadomski, 232 Mich. App. at 78-80.

In Schad v. Arizona, 501 U.S. 624 (1991), the Supreme Court considered the constitutionality of an Arizona conviction rendered pursuant to jury instructions that did not require the jury to agree on one of the alternative theories of either premeditated murder or felony murder. The Supreme Court held that the jury instructions allowing for a conviction based upon such alternative theories were not unconstitutional. Id. at 630 (plurality opinion). The Supreme Court reasoned:

> We have never suggested that in returning general verdicts in such cases the jurors should be required to agree upon a single means of commission . . . In these cases, as in litigation generally, different jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom line. Plainly there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict.

Id. at 631-32 (internal quotation omitted).

Further, the Court held that:

> If a State's courts have determined that certain statutory alternatives are mere means of committing a single offense, rather than independent elements of the crime, we simply are not at liberty to ignore that determination and conclude that the alternatives are, in fact, independent elements under state law.

Id. at 636. Thus, while a jury must agree on all of the elements of an offense, it need not agree on the means by which all of the elements were accomplished.

In the pending case, the state court held that the statutory alternatives at issue were mere means of committing a separate offense. Therefore, the jury instructions, which did not require jurors to agree on the means by which all of the elements of criminal sexual conduct were accomplished, were proper. Accordingly, the Michigan Court of Appeals' decision was not contrary to or an unreasonable application of Supreme Court precedent.

In addition, Petitioners' claims that their respective attorneys were ineffective in failing to object to the instructions on this ground also are meritless because an attorney cannot be said to have been ineffective in failing to object to property instructions.

B. Endorsement of *Res Gestae* Witness

Next, Petitioners claim that the trial court erred in permitted the prosecution to allow a late endorsement of a *res gestae* witness, Dale Smith.

It is well-established that "'federal habeas corpus review does not lie for errors of state law.'" Estelle v.

McGuire, 502 U.S. 62, 67 (1991), *quoting* Louis v. Jeffers, 497 U.S. 764, 780 (1990). The Sixth Circuit has held that "[i]n a federal habeas corpus proceeding, it is not the province of a federal appellate court to review the decision of the state's highest court on purely state law." Long v. Smith, 663 F.2d 22, 23 (6th Cir. 1981). Petitioners' claim, that the trial court erred in denying Petitioner's motion to strike a *res gestae* witness who the prosecutor had failed to identify prior to trial, is a state law claim. *See* Smith v. Elo, 1999 WL 1045877, *2 (6th Cir. Nov. 8, 1999). Therefore it is not cognizable on federal habeas corpus review.

C. Procedural Default

1. Claims Presented on Collateral Review

Respondent argues that Petitioners' first, second, third, part of the fourth, fifth and eighth claims for habeas corpus relief are procedurally defaulted because Petitioner failed to present them on direct review in state court. The Court *sua sponte* raises the issue of procedural default with respect to the third claim for relief, ineffective assistance of trial counsel, raised in Petitioners' supplemental petitions. *See* Elzy v. United States, 205 F.3d 882 (6th Cir. 2000) (holding that court may *sua sponte* raise issue of procedural default).

The doctrine of procedural default provides:

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default, and actual prejudice as a result of the

> alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman v. Thompson, 501 U.S. 722, 750 (1991). Such a default may occur if the state prisoner files an untimely appeal, Coleman, 501 U.S. at 750, if he fails to present an issue to a state appellate court at his only opportunity to do so, Rust v. Zent, 17 F.3d 155, 160 (6th Cir. 1994), or if he fails to comply with a state procedural rule that required him to have done something at trial to preserve his claimed error for appellate review, e.g., to make a contemporaneous objection, or file a motion for a directed verdict. United States v. Frady, 456 U.S. 152, 167-69 (1982); Simpson v. Sparkman, 94 F.3d 199, 202 (6th Cir. 1996). Application of the cause and prejudice test may be excused if a petitioner "presents an extraordinary case whereby a constitutional violation resulted in the conviction of one who is actually innocent." Rust, 17 F.3d at 162; Murray v. Carrier, 477 U.S. 478, 496 (1986).

For the doctrine of procedural default to apply, a firmly established state procedural rule applicable to the petitioner's claim must exist, and the petitioner must have failed to comply with that state procedural rule. Warner v. United States, 975 F.2d 1207, 1213-14 (6th Cir. 1992), *cert. denied*, 507 U.S. 932 (1993). Additionally, the last state court from which the petitioner sought review must have invoked the state procedural rule as a basis for its decision to reject review of the petitioner's federal claim. Coleman, 501 U.S. at 729-30.

The Court first considers Respondent's claim that part of Petitioners' fourth claim for habeas corpus

relief is procedurally defaulted. Respondent states that the portion of Petitioners' fourth claim that is unrelated to the failure to read a "specific unanimity" instruction to the jury is procedurally defaulted. The Court finds that the entirety of the fourth claim deals with the issue specific unanimity instruction and is addressed *supra*. Therefore, the Court finds that consideration of the fourth claim was not precluded by procedural default.

The Court now considers whether the first, second, third, fifth and eighth claims, presented in the original petitions, and the third claim presented in the supplemental petitions, are procedurally defaulted. This Court begins its analysis of whether Petitioners' claims are procedurally defaulted by looking to the last reasoned state court judgment denying Petitioners' claims. *See* Coleman, 501 U.S. at 729-30. The Michigan Supreme Court, the last state court to address these claims, which were presented for the first time on collateral review, denied leave to appeal because Petitioners "failed to meet the burden of establishing entitlement to relief under M.C.R. 6.508(D)." People v. Gadornski, No. 122218 (Mich. Feb. 28, 2003).

The Sixth Circuit Court of Appeals has held that M.C.R. 6.508(D) is a firmly established and regularly followed state ground precluding subsequent federal habeas review absent a showing of cause and prejudice where the rule was in effect at the time of a petitioner's direct appeal. Luberda v. Trippett, 211 F.3d 1004, 1007 (6th Cir. 2000), *citing* Rogers v. Howes, 144 F.3d 990 (6th Cir. 1998). M.C.R. 6.508(D) was enacted in October 1989. Petitioners were convicted in 1996. Thus, M.C.R. 6.508(D) was a

firmly established and regularly followed state procedural bar at the time of Petitioners' convictions and direct appeals. The Sixth Circuit Court of Appeals has also held that even a judgment as brief as the one by which the Michigan Supreme Court denied leave to appeal in this case is sufficient to invoke the doctrine of procedural default. Simpson-v. Jones, 238 F.3d 399, 408 (6th Cir. 2000). Accordingly, the state court's judgment clearly rested on a procedural bar and the doctrine of procedural default is invoked.

Therefore, this Court may not review Petitioners' claims unless they have established cause for the default and actual prejudice as a result of the alleged violation of federal law or unless they have demonstrated that failure to consider these claims will result in a fundamental miscarriage of justice. Coleman, 501 U.S. at 750.

Petitioners claim that their appellate attorney's ineffectiveness in failing to present these claims on direct review constitutes cause to excuse the procedural default. An ineffective assistance of counsel claim asserted as cause to excuse a procedural default can, itself, be procedurally defaulted. Edwards v. Carpenter, 529 U.S. 446, 453 (2000). "'A claim of ineffective assistance ... generally must be presented to state courts as an independent claim before it may be used to establish cause for a procedural default.'" Id., *quoting* Murray v. Carrier, 477 U.S. 478, 489 (1986). Petitioners presented their ineffective assistance of appellate counsel claim to the Michigan trial court in their motion for relief from judgment. They did not present the claim to the Michigan Court of Appeals or Michigan Supreme

Court in their applications for leave to appeal the trial court's denial of the motion for relief from judgment.

A prisoner challenging his confinement by way of a habeas corpus petition must exhaust his state court remedies prior to seeking federal habeas corpus relief by fairly presenting the substance of each federal constitutional claim in state court. 28 U.S.C. § 2254(b); Coleman v. Thompson, 501 U.S. 722, 731 (1991); Wong v. Money, 142 F.3d 313, 322 (6th Cir. 1998). A prisoner's "'fairly presents' his claim to the state courts by citing a provision of the Constitution, federal decisions using constitutional analysis, or state decisions employing constitutional analysis in similar fact patterns." Levine v. Torvik, 986 F.2d 1506, 1516 (6th Cir. 1993); *see also* Prather v. Reese, 822 F.2d 1418, 1420 (holding that "[o]rdinarily, the state courts must have had the opportunity to pass on defendant's claims of constitutional violations"). State prisoners in Michigan must raise each claim in the Michigan Court of Appeals and in the Michigan Supreme Court before seeking federal habeas corpus relief. *See* Manning v. Alexander, 912 F.2d 878, 881 (6th Cir. 1990). The petitioner bears the burden of showing that state court remedies have been exhausted. Prather, 822 F.2d at 1420, n.3. Petitioners failed to present the ineffective assistance of appellate counsel claims to the Michigan Court of Appeals or Michigan Supreme Court. Thus, the ineffective assistance of appellate counsel claims are unexhausted.

No state court remedy is available to Petitioners because each already has filed a motion for relief from judgment in the state trial court and, pursuant

to M.C.R. 6.502(G), they may not file a successive motion. Where a petitioner "fails to present his claims to the state courts and ... is barred from pursuing relief there, his petition should not be dismissed for lack of exhaustion because there are simply no remedies available for him to exhaust." Hannah v. Conley, 49 F.3d 1193, 1196 (6th Cir. 1995). However, a petitioner will not be allowed to present unexhausted claims unless he can show cause to excuse his failure to present the claims in the state courts and actual prejudice to his defense at trial or on appeal. Id.

Petitioners fail to allege any cause to excuse the procedural default of their ineffective assistance of appellate counsel claims. Thus, these claims are procedurally defaulted unless Petitioners can establish that a constitutional error resulted in a fundamental miscarriage of justice. Schlup v. Delo, 513 U.S. 298 (1995).

The Supreme Court explicitly has tied the miscarriage of justice exception to procedural default to a petitioner's innocence. Schlup, 513 U.S. at 321. Thus, Petitioners must assert a constitutional error along with a claim of innocence. "To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence -- whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence -- that was not presented at trial." Id.

Petitioners have not supported their allegation of constitutional error with new reliable evidence of actual innocence that was not presented to the trial court. Accordingly, Petitioners' claims that their constitutional rights were violated by the ineffective

assistance of appellate counsel are procedurally barred.

Because Petitioner's ineffective assistance of appellate counsel claims are procedurally defaulted, they cannot serve as cause to excuse Petitioners' procedural default of habeas claims one, two, three, five, and eight of the original petitions or claim three of the supplemental petitions. Accordingly, those claims are also procedurally defaulted because Petitioners have failed to establish cause to excuse the default and also have failed to satisfy the manifest injustice exception to procedural default.

2. Unexhausted Claims

Respondent also argues that Petitioners have each defaulted their seventh claim for habeas relief regarding allegedly disproportionate sentences because they have not exhausted those claims. The Court *sua sponte* raises procedural default with respect to the first and second claims for habeas relief asserted in Petitioners' pro per supplemental petitions, regarding the trial court's alleged misconduct during the deliberation and sentencing phases, and alleged prosecutorial misconduct.

As discussed *supra*, state prisoners in Michigan must raise each claim in the Michigan Court of Appeals and in the Michigan Supreme Court before seeking federal habeas corpus relief. *See* Manning v. Alexander, 912 F.2d 878, 881 (6th Cir. 1990). Petitioners' sentencing, judicial misconduct, and prosecutorial misconduct claims were never presented to the Michigan Court of Appeals or Michigan Supreme Court. Petitioners no longer have an available means of presenting these claims in

state court. Thus, the claims are procedurally defaulted.

Petitioners allege that their appellate attorney was ineffective in failing to present these claims on direct appeal. However, Petitioners fail to allege cause for their failure to present these claims to the Michigan appellate courts on collateral review. Therefore, they have failed to establish cause to excuse the procedural default. These claims are therefore barred unless Petitioners can establish that a constitutional error resulted in a fundamental miscarriage of justice. Schlup, 513 U.S. 298 (1995). Applying the Schlup standard of actual innocence to Petitioners' cases, 513 U.S. at 327, Petitioners have not persuaded this Court that no juror, acting reasonably, would have found them guilty beyond a reasonable doubt. Therefore, these claims are barred from review by procedural default.

V. Conclusion

For the foregoing reasons, **IT IS ORDERED** that the petitions for writs of habeas corpus filed by Lawrence Earl Gadomski and Anthony Gadomski are **DENIED** and the matters are **DISMISSED WITH PREJUDICE**.

/s/ Nancy Edmunds
NANCY G. EDMUNDS
UNITED STATES
DISTRICT JUDGE

SUPREME COURT OF MICHIGAN

People

v.

Anthony Gadomski; People v. Lawrence Earl Gadomski

NOS. 122217, 122218. COA Nos. 240437, 240438.

February 28, 2003

Disposition: Delayed application for leave to appeal from July 3, 2002 decision of the Court of Appeals is DENIED, the defendants have failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

Mich. 2003.

People v. Gadomski

468 Mich. 853, 658 N.W.2d 486 (Table)

COURT OF APPEALS, STATE OF MICHIGAN

ORDER

People of MI **v Anthony Gadomski**	**Michael J. Talbot** **Presiding Judge**
Docket No. 240437	**Helene N. White**
LC No. 96-000065-FC	**Christopher M. Murray** **Judges**

The Court orders that the delayed application for leave to appeal is DENIED because defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

/s/ Michael J. Talbot
Presiding Judge

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF ST. CLAIR COUNTY

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v.

LAWRENCE GADOMSKI,

Defendant.

Case No. 96-000673-FC

HON. PETER E. DEEGAN

ORDER DENYING DEFENDANT'S MOTION FOR RELIEF FORM JUDGMENT

At a session of said court held in the City of Port Huron, County of St. Clair, State of Michigan, on April 2, 2001.

Defendant and his Co-defendant brother were tried together and convicted by jury verdict on June 11, 1996. Lawrence Gadomski, Case No. 96-673, was convicted of one count of CSC 1st and Habitual Offender, 4th Notice. Anthony Gadomski, Case No. 96-65 was convicted of CSC 1st, Aiding and Abetting CSC 1st, Assault with a dangerous weapon and Habitual Offender 2nd. They were sentenced on July 1, 1996 to 20-60 years and 25-60 years respectively. The cases were consolidated for appellate purposes.

The Court of Appeals affirmed the convictions in an opinion published October 2, 1998, No. 197049-

197050. The Michigan Supreme Court denied application for leave to appeal on May 25, 1999.

On May 22, 2000 Defendants filed a Motion for Relief from Judgment; a Motion to Enlarge the Record and a request for an evidentiary hearing. Defendants raise numerous issues, including several that were previously addressed by the Court of Appeals. MCR 6.508(D)(2) provides that the Court may not grant relief to the defendant if the motion alleges grounds for relief which were decided against the defendant in a prior appeal unless the defendant establishes that a retroactive change in the law has undermined the prior decision.

As a result, this Court will not address the following issues as raised by Defendants: the testimony of witness Dale Smith, jury instructions or the sufficiency of evidence on the charges against Defendants. All of these issues were address by the Court of Appeals in its Opinion issues October 2, 1998. There has been no showing of a change in the law which would undermine that decision.

Several issues remain, including due process violations based on this Court's conduct, the disproportionality of the sentences in this case and the ineffective assistance of counsel at the trial level. MCR 6.508(D)(3) provides that this Court may not grant relief to the defendant if the motion alleges grounds for relief which could have been raised on appeal unless the defendant demonstrates good cause for failure to raise such grounds earlier and actual prejudice from the alleged irregularities. The Court may waive the good cause requirement if it concludes that there is a significant possibility that the defendant is innocent of the crime.

Defendants concede that they have no good cause for not raising the issues on their earlier appeal. Defendants are asking the Court to grant their motion for an evidentiary hearing, so they might enlarge the record to establish good cause under the Court Rule.

Under MCR 6.508(D), the defendant has the burden of establishing entitlement to the relief requested. This Court has reviewed the pleadings of the Defendants and finds that they have failed to meet their burden. The Court also finds that there is no basis for waving the good cause requirement under the Court Rule. Based on the admission of Defendants that they do not have good cause for failing to raise these issues on their earlier appeal, combined with lack of merit on the issues presented, Defendants Motions for Relief from Judgment and for Evidentiary Hearing are DENIED.

SO ORDERED.

/s/ Peter E. Deegan
PETER E. DEEGAN
(P 12619)
Circuit Court Judge

MICHIGAN SUPREME COURT
LANSING, MICHIGAN

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

ANTHONY GADOMSKI,

Defendant-Appellant.

SC: 113568
COA: 197050
St. Clair CC: 96-000065-FC

On order of the Court, the delayed application for leave to appeal from the October 2, 1998 decision of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Young, Jr., J., not participating.

Court of Appeals of Michigan.

PEOPLE of the State of Michigan, Plaintiff-Appellee,

v.

Lawrence Earl GADOMSKI, Defendant-Appellant.

People of the State of Michigan, Plaintiff-Appellee,

v.

Anthony Gadomski, Defendant-Appellant.

Docket Nos. 197049, 197050.

Submitted Sept. 1, 1998, at Detroit.

Decided Oct. 2, 1998, at 9:15 a.m.

Released for Publication Jan. 8, 1999.

Frank J. Kelley, Attorney General, Thomas L. Casey, Solicitor General, Elwood L. Brown, Prosecuting Attorney, and Timothy K. Morris, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by Debra A. Gutierrez), for Lawrence E. Gadomski.

Douglas R. Mullkoff, Ann Arbor, for Anthony Gadomski.

Before TALBOT, P.J., and FITZGERALD and YOUNG, Jr., JJ.

TALBOT, P.J.

Defendants Lawrence Earl Gadomski and Anthony Gadomski were tried in a joint trial before a single

jury. Defendant Lawrence Gadomski was convicted of one count of first-degree criminal sexual conduct (CSC I), M.C.L. § 750.520b; MSA 28.788(2), and found not guilty of three counts of CSC I. He was sentenced as an habitual offender, fourth offense, M.C.L. § 769.12; MSA 28.1084, to twenty to sixty years' imprisonment for his CSC I conviction. Defendant Anthony Gadomski was convicted of two counts of CSC I and one count of felonious assault, M.C.L. § 750.82; MSA 28.277, and found not guilty of three counts of CSC I and one count of first-degree home invasion, M.C.L. § 750.110a; MSA 28.305(a). He was sentenced as an habitual offender, second offense, M.C.L. § 769.10; MSA 28.1082, to concurrent terms of twenty-five to sixty years' imprisonment for each of his CSC I convictions and two to six years' imprisonment for his felonious *27 assault conviction. Defendants appeal as of right. Their appeals were consolidated on this Court's motion. We affirm.

At trial, the victim testified that late on the evening of December 14, 1995, defendant Anthony Gadomski, an acquaintance of hers, entered her house uninvited through the bathroom window and proceeded to let his brother, defendant Lawrence Gadomski, and an unidentified third person in through the back door. After defendant Anthony Gadomski informed the victim that her incarcerated boyfriend owed him $10,000, he and his brother spent the remainder of the night forcing her to engage in various sexual acts and helping themselves to her food and drink. Once during the night, defendant Anthony Gadomski threatened the victim by **78 holding a kitchen knife to her neck. Defendants left the victim's house on the following morning, taking some of her property with them. Defendant Anthony

Gadomski testified that he was invited into the victim's house and that he and the victim engaged in consensual sex. Defendant Lawrence Gadomski did not testify.

Docket No. 197049

[1] [2] Defendant Lawrence Gadomski FN1 first argues that the trial court erred in denying his motion for a new trial brought on the ground that the jury's verdict was against the great weight of the evidence. We disagree. A trial court's decision on a motion for a new trial is reviewed for an abuse of discretion. *28 People v. Torres (On Remand), 222 Mich.App. 411, 415, 564 N.W.2d 149 (1997).

FN1. In this section, use of "defendant," in the singular, will hereafter refer only to Lawrence Earl Gadomski. Use of "defendants" will refer to both Anthony Gadomski and Lawrence Earl Gadomski.

[3] Specifically, defendant contends that the trial court abused its discretion in denying his motion in the face of the victim's "wildly inconsistent" trial testimony. At the time of defendant's motion, the law provided that, in a motion for a new trial based on the great weight of the evidence, the trial court could act as a "thirteenth juror" and independently evaluate the credibility of the trial witnesses. See People v. Herbert, 444 Mich. 466, 476, 511 N.W.2d 654 (1993). The Michigan Supreme Court has subsequently rejected the "thirteenth juror" standard and explained that a trial court may grant a motion for a new trial based on the great weight of the evidence only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand. People v. Lemmon, 456 Mich. 625, 627, 576 N.W.2d 129 (1998).

However, neither the former nor the current understanding of the law with respect to such motions provides that this Court may make a credibility determination on appeal. To the contrary, it is well settled that this Court may not attempt to resolve credibility questions anew. See, e.g., People v. Daoust, 228 Mich.App. 1, 17, 577 N.W.2d 179 (1998); People v. McFall, 224 Mich.App. 403, 412, 569 N.W.2d 828 (1997). Accordingly, we cannot say that the trial court abused its discretion in denying defendant's motion for a new trial.

Next, defendant argues that he was denied his right to a unanimous jury verdict as a result of the trial court's instructions to the jury regarding the elements of CSC I. We disagree.

*29 A trial court is required to instruct the jury concerning the law applicable to the case and to fully and fairly present the case to the jury in an understandable manner. MCL 768.29; MSA 28.1052; People v. Mills, 450 Mich. 61, 80, 537 N.W.2d 909 (1995), modified 450 Mich. 1212, 539 N.W.2d 504 (1995). In this case, the trial court instructed the jury that in order to find defendant guilty, it was required to find that defendant engaged in the specific act of sexual penetration alleged by the prosecution and that this act was accompanied by one of three alternative aggravating circumstances. The aggravating circumstances made available for the jury's consideration included (1) that the act occurred during the commission of a home invasion, see M.C.L. § 750.520b(1)(c); MSA 28.788(2)(1)(c), (2) that it involved aiding and abetting and force or coercion, see M.C.L. § 750.520b(1)(d)(ii); MSA 28.788(2)(1)(d)(ii), and (3) that it caused personal

injury to the victim and involved force or coercion, see M.C.L. § 750.520b(1)(f); MSA 28.788(2)(1)(f). The trial court also instructed the jurors, in general terms, that it was their job to decide the facts of the case and that their verdict must be unanimous.

[4] Defendant contends that the trial court should have instructed the jury that it was required to unanimously agree on the existence of at least one of the three aggravating circumstances alleged by the prosecution. He maintains that, because no special unanimity instruction was given, the jury might have unanimously agreed on the general existence of an aggravating circumstance without unanimously agreeing on the existence of any one of the aggravating circumstances in particular. Defendant failed **79 to raise the issue at trial by requesting such an instruction or by *30 objecting to the trial court's instructions on that basis. Accordingly, our review is limited to the question whether relief is necessary to avoid manifest injustice. See People v. Van Dorsten, 441 Mich. 540, 544-545, 494 N.W.2d 737 (1993); People v. Yarger, 193 Mich.App. 532, 536-537, 485 N.W.2d 119 (1992).

[5] [6] Criminal defendants are guaranteed a unanimous jury verdict under the state constitution. See Const 1963, art 1, § 14; People v. Cooks, 446 Mich. 503, 510-511, 521 N.W.2d 275 (1994). Consequently, trial courts are required to give proper instructions regarding the unanimity requirement. Id. at 511, 521 N.W.2d 275. In some circumstances, a general unanimity instruction such as the one given in this case is not adequate to ensure a defendant's right to a unanimous jury verdict. For instance, the Michigan Supreme Court has held that when the

prosecution offers evidence of multiple acts by a defendant, each of which would satisfy the actus reus element of a single charged offense, the trial court is required to instruct the jury that it must unanimously agree on the same specific act if the acts are materially distinct or if there is reason to believe the jurors may be confused or disagree about the factual basis of the defendant's guilt. Id. at 530, 521 N.W.2d 275. Relying on this holding, defendant suggests that he was entitled to a special unanimity instruction in this case because the separate aggravating circumstances on which the jury was instructed involved alternative factual situations (i.e., a home invasion, aiding and abetting, or a personal injury). We are not persuaded by defendant's argument.

[7] [8] [9] Michigan criminal juries are not required to unanimously agree upon every fact supporting a guilty verdict. See, e.g., *31 People v. Espinosa, 142 Mich.App. 99, 105, 369 N.W.2d 265 (1985) (explaining that, in theory, a defendant could be convicted of murder by a jury in which six members were of the opinion that the defendant shot the victim acting as the principal, and the other six members were of the opinion that he aided and abetted another). More specifically, it is well settled that when a statute lists alternative means of committing an offense, which means in and of themselves do not constitute separate and distinct offenses, jury unanimity is not required with regard to the alternate theories. See People v. William Johnson, 187 Mich.App. 621, 629-630, 468 N.W.2d 307 (1991), cited with apparent approval in Cooks, supra at 515, n. 16, 521 N.W.2d 275; see also People v. Lynn, 223 Mich.App. 364, 366-367, 566 N.W.2d 45

(1997); People v. Asevedo, 217 Mich.App. 393, 551 N.W.2d 478 (1996); cf. Yarger, supra at 537, 485 N.W.2d 119. That was the case here. Where there is a single sexual penetration, the various aggravating circumstances listed in M.C.L. § 750.520b; MSA 28.788(2), constitute alternative means of proving a single CSC I offense, and would not support convictions of separate and distinct CSC I offenses. See People v. Willie Johnson, 406 Mich. 320, 330-331, 279 N.W.2d 534 (1979). Accordingly, defendant would have been properly convicted of CSC I even if some of jurors believed that he committed the offense solely on the basis of one aggravating circumstance, while the rest of the jurors believed that he committed the offense solely on the basis of another one of the aggravating circumstances.

[10] [11] In sum, we hold that when a defendant is tried on a charge of CSC I, and more than one aggravating circumstance is supported by the facts, it is not error for the trial court to instruct the jury, in the alternative, *32 regarding each of the applicable aggravating circumstances alleged by the prosecution.FN2 In this case, because the trial court's **80 instructions were legally correct, manifest injustice will not result from our failure to grant the relief requested.

FN2. The standard jury instruction for CSC I advises trial courts to follow the instruction for sexual penetration with an instruction for "one" of the nine alternative aggravating circumstances. See CJI2d 20.1(3). The implication is that trial courts should not instruct juries, in the alternative, regarding multiple aggravating circumstances. However, we note that the Michigan Criminal Jury

Instructions do not have the official sanction of the Michigan Supreme Court. "Their use is not required, and trial judges are encouraged to examine them carefully before using them, in order to ensure their accuracy and appropriateness to the case at hand." People v. Petrella, 424 Mich. 221, 277, 380 N.W.2d 11 (1985). The record suggests that the trial court did so in this case.

Defendant next argues that he was denied the effective assistance of counsel when his trial counsel failed to request a special unanimity instruction. We disagree. Because defendant was not entitled to such an instruction, defense counsel's failure to request the instruction did not constitute ineffective assistance of counsel. See Torres, supra at 425, 564 N.W.2d 149.

[12] [13] [14] [15] Finally, defendant argues that the trial court erred in allowing the prosecution's late endorsement of Dale Smith, a res gestae witness.FN3 We disagree. A trial court's decision to allow a late endorsement of a witness is reviewed for an abuse of discretion. People v. Canter, 197 Mich.App. 550, 563, 496 N.W.2d 336 (1992). An abuse of discretion exists when the court's decision is so grossly violative of fact and logic that it evidences perversity of will, defiance of judgment, and the exercise of passion or bias. Stated differently, an *33 abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling. E.g., People v. Ullah, 216 Mich.App. 669, 673, 550 N.W.2d 568 (1996).

FN3. "A res gestae witness is a person who witnesses some event in the continuum of a criminal

transaction and whose testimony will aid in developing a full disclosure of the facts." People v. O'Quinn, 185 Mich.App. 40, 44, 460 N.W.2d 264 (1990).

During defendant's preliminary examination, the victim testified that a third person came to her house with defendants on the night of the crime. The victim could not identify this person. At trial, the prosecutor informed the jury during her opening statement that the victim would testify that, on the night of the crime, defendants came to her house with another person. She did not suggest that the name of the unidentified third person was known by anybody. Defendant's counsel then predicted in his opening statement that, contrary to the victim's story, the evidence would show that defendants were not accompanied by a third person.

Two days later, before the second day of trial, the prosecution moved to amend its witness list to add the "third person," Dale Smith. The prosecutor explained that, although the police initially suspected that Smith may have been the third person present on the night of the crime, his presence could not be confirmed during their investigation. The victim did not have enough contact with the third person to make an identification, and no fingerprints consistent with Smith's were found at the scene. Consequently, Smith was discounted, and the police "gave up" in their efforts to locate and question him. Police efforts to discover the identity of the third person were renewed in response to defense counsel's opening statement. This led to Smith's discovery in Florida. After Smith admitted that he was the third person *34 involved in the incident, he was persuaded to

come to Michigan to testify for the prosecution. Defense counsel argued that it was his belief that the prosecution had known all along that Smith had some involvement in the case, but that it had decided not to pursue the matter. Upon consideration of the parties' arguments, the trial court explained that it would allow the late addition of Smith's name to the witness list because his "identity and involvement" did not "come to light until into the trial itself."

On appeal, defendant contends that he was prejudiced by the late endorsement, because trial counsel, relying on the pretrial witness list, incorrectly predicted that the evidence would not support the prosecution's (and the victim's) assertion that an unidentified third person was present with defendants on the night of the crime. After Smith testified about his presence at the victim's house on the night of the incident,FN4 Anthony Gadomski **81 agreed, in his testimony, that Smith was there. The prosecutor then emphasized this point by reminding the jury during her rebuttal argument that, contrary to defendants' initial assertions, "the People were able to bring forward that third person." Although this course of events undoubtedly hurt defendant's case in the eyes of the jury, we do not believe that his defense was unfairly prejudiced to such a degree that the trial court's decision *35 to allow Smith to testify amounted to an abuse of discretion.

FN4. Smith, who because of a stroke was blind in one eye and partially blind in the other and suffered from long-and short-term memory problems, testified that he was in the victim's house on the night of the incident, but that he never actually saw the victim or

any sexual activity. For part of the night he was asleep. However, he recalled that, at one point, Anthony Gadomski threatened him with a knife and told him not to leave the house.

[16] [17] The res gestae witness statute provides as follows:

(1) The prosecuting attorney shall attach to the filed information a list of all witnesses known to the prosecuting attorney who might be called at trial and all res gestae witnesses known to the prosecuting attorney or investigating law enforcement officers.

(2) The prosecuting attorney shall be under a continuing duty to disclose the names of any further res gestae witnesses as they become known.

(3) Not less than 30 days before the trial, the prosecuting attorney shall send to the defendant or his or her attorney a list of the witnesses the prosecuting attorney intends to produce at trial.

(4) The prosecuting attorney may add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties.

(5) The prosecuting attorney or investigative law enforcement agency shall provide to the defendant, or defense counsel, upon request, reasonable assistance, including investigative assistance, as may be necessary to locate and serve process upon a witness. The request for assistance shall be made in writing by defendant or defense counsel not less than 10 days before the trial of the case or at such other time as the court directs. If the prosecuting attorney objects to a request by the defendant on the grounds that it is unreasonable, the prosecuting attorney shall file a

pretrial motion before the court to hold a hearing to determine the reasonableness of the request.

(6) Any party may within the discretion of the court impeach or cross-examine any witnesses as though the witness had been called by another party. [MCL 767.40a; MSA 28.980(1).]

The prosecution's duty under the statute is to provide notice of known witnesses and reasonable assistance *36 to locate witnesses on a defendant's request. People v. Burwick, 450 Mich. 281, 289, 537 N.W.2d 813 (1995). There is no requirement to exercise due diligence to discover the names of witnesses. Id. at 293, 537 N.W.2d 813. "[T]he purpose of the 'listing' requirement is merely to notify the defendant of the witness' existence and res gestae status." People v. Calhoun, 178 Mich.App. 517, 523, 444 N.W.2d 232 (1989).

In this case, given the victim's preliminary examination testimony, defendant could not have been surprised that the prosecution would offer some evidence of a third person's involvement. Because defendant knew that an unnamed third person was alleged to have been involved, he could have requested assistance in identifying and locating him before trial. See M.C.L. § 767.40a(5); MSA 28.980(1)(5). Instead, in an apparent gamble that the prosecution's case would be weakened by a failure to prove the existence of the alleged third person, defendant chose not to avail himself of the prosecution's assistance. With no request from the defense to provide reasonable assistance, and no evidence suggesting that the unidentified third person was Smith, the prosecution was under no duty to continue pursuing that avenue. See Burwick,

supra at 289, 293, 537 N.W.2d 813. Moreover, without knowledge of Smith's status as a res gestae witness, the prosecution was under no duty to include Smith's name on the pretrial witness list. Id. Finally, the necessary explanation, or "good cause," for Smith's late addition to the witness list was provided by the fact of his late discovery as a res gestae witness. Accordingly, defendant is not entitled to relief with regard to this issue.

**82 *37

Docket No. 197050

The issues raised on appeal by defendant Anthony Gadomski are identical to issues raised by defendant Lawrence Earl Gadomski.FN5 Accordingly, for the reasons stated above, defendant Anthony Gadomski is not entitled to relief.

FN5. Defendant Anthony Gadomski challenges the absence of a special unanimity instruction with respect to the CSC I counts and the late endorsement of Dale Smith, but does not contend that the jury's verdict was against the great weight of the evidence.

Affirmed.

Mich.App.,1998.

People v. Gadomski

232 Mich.App. 24, 592 N.W.2d 75

STATE OF MICHIGAN

PEOPLE OF THE STATE OF MICHIGAN

-vs-

ANTHONY GADOMSKI

LAWRENCE GADOMISKI

Defendants.

Case No. D-96-0065-FC

Case No. D-96-0673-FC

Volume No. VI

Jury Trial

PROCEEDINGS HAD AND TESTIMONY TAKEN in the above-entitled cause, before the HONORABLE JAMES P. ADAIR, Judge, 31st Judicial Circuit and Jury, at Courtroom 312, County Building, Port Huron, St. Clair County, Michigan, on Tuesday, June 11, 1996.

APPEARANCES:

MARY ROY KELLY

ASSISTANT ST. CLAIR COUNTY PROSECUTOR

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On behalf of the People

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On behalf of the Defendant
Anthony Gadomski
MICHAEL L. WEST
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On behalf of the Defendant
Lawrence Gadomski

Port Huron, Michigan
Tuesday, June 11, 1996

* * * * *

(Jury deliberating at about 9:30 a.m.)

(Court in session at about 11:55 a.m.)

THE COURT: Counsel, I intend to bring the jury out and excuse them for lunch, and that I require that they return no later than 1:30 directly to the jury room.

So Mad'am – Mr. Bailiff – Mad'am Bailiff, please bring the jury in.

(Whereupon, the jury entered the courtroom)

THE BAILIFF: The jury is impaneled in the jury box.

THE COURT: Thank you. Be seated please, ladies and gentlemen.

I'm Jim Adair. I think Judge Deegan may have warned you yesterday that I'll be here filling in for him. I'm a Circuit Judge, and well, what you're out here for is to excuse you for lunch, ask you to return no later than 1:30 this afternoon directly to the jury room.

In the meanwhile, though, I remind you, as I'm sure Judge Deegan has reminded, that you may not discuss this case at all in any way, shape, or form. You can go to lunch together if you want. You can talk about anything, your children, your grandchildren, the weather, but you may not have any kind of a conversation about this case. The only time you discuss this case is when you're all together and you're in the jury room and deliberating as a jury.

So with that, then, I'll excuse and ask you to return no later than 1:30 directly to the jury room.

Thank you.

THE COURT: Okay. Off the record. Thank you.

(Whereupon, the Court was in recess at about 11:55 a.m.)

(Jury deliberating at about 1:30 p.m.)

(Court in session at about 2:50 p.m.)

THE COURT: Okay, counsel.

Kathie, are we on the record?

I believe, I have a question from the jury that reads as follows: Do we have to have a verdict on all counts?

We've discussed this in chambers and agreed that the answer when I bring the jury out is to tell them the answer to their question is no.

You agree, Prosecutor?

MRS. KELLY: Yes, your Honor, the People agree.

MR. WALKE: Defense agree.

Your Honor, it's my understanding that we have multiple counts. Each count is treated individually

or separately as a separate rime. The jury has to make a decision on each count separately, so it's my quick review from the law library that they are treated individually, and a jury could reach a verdict on some of the counts and not on others.

THE COURT: All right. And do you agree with my – okay. I understand.

MR. WALKE: I think the Court's answer –

THE COURT: I understand the reason for that on the record, but do you also agree that the answer to be given to this question is no?

MR. WALKE: I would agree.

THE COURT: All right. Mr. West?

MR. WEST: Judge, I agree also, and the thing – the counts must be treated individually. Really haven't had a chance to research this issue to see if that is the correct answer. I think indubitably that's the answer we all fee comfortable, and I think we've made enough of a record on it.

All right. All right. Then there will be no further explanation at least to answer this question. I'll just simply say ladies and gentlemen, the answer to the question is no.

Okay. Let's bring the jury in.

(Whereupon, the jury entered the courtroom)

THE BAILIFF: Jury is impaneled in the jury box.

THE COURT: Thank you. Be seated please, ladies and gentlemen.

Ladies and gentlemen, I have this question that's been presented by the jury: Do we have to have a verdict on all counts? The answer to this question is no.

Now you may continue back, go back to the jury room and continue your deliberations.

Thank you. Go ahead, back to the jury room.

(Whereupon, the Court was in recess at about 2:53 p.m., and was back in session at about 4:05 p.m.)

THE COURT: Counsel, we have a message that the jury has sent out indicating they have reached a verdict and I'm going to ask the jury to be brought in, please, Sue.

I'm going to, if we poll the jury, counsel, I'm going to assign seat number, seat number one, number two, number three. Even if it's blank it will be number four, for example.

MR. WALKE: That's fine.

THE COURT: Or vacant, I should have said. And that way I will not identify them by juror number or name. And I'll explain that to them.

(Whereupon, the jury entered the courtroom)

THE BAILIFF: The jury is impaneled in the jury box.

THE COURT: Thank you. Be seated please, ladies and gentlemen.

Ladies and gentlemen, I have a message that you've reached a verdict, and I'm in just a second, I'm going to ask the clerk to inquire of your foreperson about that verdict. And quite often what I do is I ask the – after we do all that, I'll ask counsel if they want the jury polled, and that means that each one of you will be – an inquiry will be made of you by the clerk as to whether or not that's your verdict. And what we'll do if that should be the case, we're not going to call you by name, but we'll call you by seat number,

and I'm going to assign the seat right now so you understand that's seat number one, number two, number three. Five is vacant. Six, seven, eight, back in the corner, nine, ten, eleven, twelve. Why do I, I see there's two back seats, so anyway, those, they're not by names or persons, they're named by, they're by seats, so even though there's a vacant seat that seat has a number.

Now, Mad'am Clerk, will you inquire of the foreperson if a verdict has been reached.

THE CLERK: In the case of the People of the State of Michigan versus Anthony Gadomski and Lawrence Gadomski, would the foreperson please rise?

JUROR 6: We can't hear.

THE CLERK: I'm sorry, I'll talk –

THE COURT: A little louder, please.

THE CLERK: Has the jury reached a verdict?

JUROR 1: We have.

THE CLERK: Is the verdict unanimous?

JUROR 1: Yes.

THE CLERK: Would you please read the verdict as to Anthony first?

JUROR 1: Count, shall I go through –

THE COURT: Just start right out Count I.

JUROR 1: Read it?

THE COURT: Yes.

JUROR 1: Criminal sexual conduct first degree, penile/vaginal. We, the jury, find the Defendant, not guilty.

Criminal sexual conduct first degree, Count II, penile/vaginal. We, the jury, find the Defendant, not guilty.

THE COURT: That's Anthony Gadomski, right?

JUROR 1: Correct.

Count III, criminal sexual conduct first degree, penile/vaginal. We, the jury, find the Defendant, Anthony Gadomski, guilty as charged of criminal sexual conduct first degree.

Count IV, aiding and abetting criminal sexual conduct first degree, vaginal with flashlight. We, the jury, find the Defendant, Anthony Gadomski, not guilty.

Count V, aiding and abetting criminal sexual conduct first agree, anal penetration with a bottle. We, the jury, find the Defendant, Anthony Gadomski, guilty as charged of aiding and abetting criminal sexual conduct first degree.

County VI, assault with a dangerous weapon. We, the jury, find the Defendant, Anthony Gadomski, guilty as charged of assault with a dangerous weapon.

Count VII, home invasion first degree. We, the jury, find the Defendant, Anthony Gadomski, not guilty.

THE CLERK: And now as to Lawrence Gadomski.

JUROR 1: Count VII, home invasion, first degree. We, the jury, find the Defendant, Lawrence Gadomski, not guilty.

Count IX, criminal sexual conduct first degree, penile/oral. We, the jury, find the Defendant, Lawrence Gadomski, not guilty.

Count X, criminal sexual conduct first degree, penile/oral. We, the jury, find the Defendant, Lawrence Gadomski, not guilty.

Count XI, criminal sexual conduct first degree, anal penetration with a bottle. We, the jury, find the Defendant, Lawrence Gadomski, guilty as charged of criminal sexual conduct first degree.

Count XII, criminal sexual conduct first degree, vaginal with flashlight. We, the jury, find the Defendant, Lawrence Gadomski, not guilty.

THE COURT: Thank you, sir.

THE CLERK: Would all the jurors please stand and raise your right hand?

Ladies and gentlemen of the jury, listen to your verdict as announced by your foreman. Do you say upon you oath that that is your verdict, so help you God?

JURORS: Yes.

THE CLERK: You may be seated.

THE COURT: Thank you. Be seated.

Sue, would you bring me that form of verdict, please?

THE BAILIFF: Thank you.

THE COURT: Thank you. I'm just going to take a second to review this.

Mad'am Prosecutor, do you request that the jury be polled?

MRS. KELLY: The People pass.

THE COURT: Thank you.

Defendant – Mr. Walke, do you ask that the jury be polled?

MR. WALKE: We request that it be done.

THE COURT: All right. Will you poll the jury using seat number one.

THE CLERK: Juror 1, is that your verdict?

JUROR SZOTZKI: Yes.

THE CLERK: Juror Number 2, is this your verdict?

JUROR BERNARDO: Yes.

THE CLERK: Juror Number 3, is this your verdict?

JUROR MATHEWS: Yes, it is.

THE CLERK: Juror Number 5, is this your verdict?

JUROR SINGER: Yes.

THE CLERK: Juror Number 6, is this your verdict?

JUROR HOSTED: Yes.

THE CLERK: Juror Number 7, is this your verdict?

JUROR LINDOW: Yes.

THE CLERK: Juror Number 8, is this your verdict?

JUROR WAY: Yes.

THE CLERK: Juror Number 9, is this your verdict?

JUROR DANIELS: Yes, it is.

THE CLERK: Juror Number 10, is this your verdict?

JUROR CARSON: Yes, it is.

THE CLERK: Juror Number 11, is this your verdict?

JUROR HOSKEY: Yes.

THE CLERK: Juror Number 12, is this your verdict?

JUROR KELLY: Yes.

THE COURT: Thank you.

Mr. West, do you require the jury to be polled?

MR. WEST: Judge, I assume when they each said yes, that that applied to both of the Defendants.

Would that be correct?

JUROR 6: Can't hear you.

JUROR 7: Yes.

THE COURT: Mr. West, Mr. West has assumed that when you answered as you just have being polled, that you're answering as to both Defendants. If that assumption is not correct, please raise your right hand.

A negative response.

MR. WEST: Then I don't believe that a polling, a separate polling is necessary. Thank you, Judge.

THE COURT: All right. Thank you.

I have reviewed the form of the verdict as has been announced by the foreperson and, and it has been each of the, each of the forms of the verdict have been signed and dated. I find them to be in proper order.

Ladies and gentlemen, now I'm going to dismiss you with my sincere thank you on behalf of Judge Deegan and on behalf of the attorneys that are involved in this case, and the parties that are involved in this case. You are now, you are now free

to discuss this case with whomever you wish to discuss it. You're not, however, required to discuss the case if you don't want to do that.

If you decide that you want to, and let me just suggest to you, quite often the attorneys do like to discuss it with you. It's a learning tool for them quite often, and if you decide that you're willing to talk with them, I remind you you're not required to do that; that they will only talk with you in the hallway, won't do this in the jury room, and they will be respectful if you decide that you don't want to.

So, with that, then, I discharge you with my sincere thank you. Thank you very much. Go back to the jury room and then you may leave. Thank you very much.

(Whereupon, the jury was discharged)

THE COURT: Do we have to do something on the record because of the habitual?

You may be seated.

Because of the habitual, do we have to take some testimony? Do we have to take some admissions? Do we have to do something about the habitual?

MRS. KELLY: Your Honor, --

THE COURT: Mr. Anthony Gadomski, there was a habitual offender second notice. And on Lawrence Earl Gadomski there was a habitual fourth notice.

MR. WALKE: Your Honor, maybe I could save the Court some time. This case did go, proceed to trial. We are not prepared to make any admissions regarding the habitual, and certainly the Court, the Court at sentencing certainly can take that in consideration with the change in the law, so we

would request that that be done at the time of sentencing rather than now.

THE COURT: All right. Mr. West?

MR. WEST: I think that would be appropriate as to Lawrence Gadomski, also.

MRS. KELLY: My only request if we find during the course of the pre-sentence, if there's any confusion or question as to the prior convictions, that the People be told so we can bring the proper certifications to court if necessary.

THE COURT: All right. We'll note that for the record.

MR. WEST: That's, that's fine.

THE COURT: Next matter, bond. I take it – well, we've got to set the sentencing date. Sentencing date is set for July 1, 1996, at 1:30 in the afternoon in this courtroom.

Bond, I take it that orderly bond is just continued.

Is there any reason that that should not be done?

Bond will be continued.

MR. WALKE: Anything else before we dismiss, before we're discharged?

Hearing none, then we are dismissed.

MRS. KELLY: Thank you, your Honor.

(Court in recess at about 4:15 p.m.)

REPORTER'S CERTIFICATE

STATE OF MICHIGAN

SS

COUNTY OF ST. CLARK

I, KATHIE SCHEIKART, an Official Court Reporter in and for the Circuit Court for the 31st Judicial Circuit, State of Michigan, do hereby certify that I have reported stenographically the proceedings had and testimony taken in the above-entitled matter, and I do further certify that the foregoing transcript constitutes a full, true and complete transcript of said stenographic notes.

KATHIE SCHWIKART, CSR-3271

Official Court Reporter

DATED: This 19 day of September, 1996.

MICHIGAN COURT RULES
SUBCHAPTER 6.500 POSTAPPEAL RELIEF
RULE 6.501 SCOPE OF SUBCHAPTER

Unless otherwise specified by these rules, a judgment of conviction and sentence entered by the circuit court or the Recorder's Court for the City of Detroit not subject to appellate review under subchapters 7.200 or 7.300 may be reviewed only in accordance with the provisions of this subchapter.

(Current as of 11/15/2005)

RULE 6.502 MOTION FOR RELIEF FROM JUDGMENT

(A) Nature of Motion. The request for relief under this subchapter must be in the form of a motion to set aside or modify the judgment. The motion must specify all of the grounds for relief which are available to the defendant and of which the defendant has, or by the exercise of due diligence, should have knowledge.

(B) Limitations on Motion. A motion may seek relief from one judgment only. If the defendant desires to challenge the validity of additional judgments, the defendant must do so by separate motions. For the purpose of this rule, multiple convictions resulting from a single trial or plea proceeding shall be treated as a single judgment.

(C) Form of Motion. The motion must be typed or legibly handwritten and include a verification by the defendant or defendant's lawyer in accordance with MCR 2.114. The motion must be substantially in the

form approved by the State Court Administrator, and must include:

(1) The name of the defendant;

(2) The name of the court in which the defendant was convicted and the file number of the defendant's case;

(3) The place where the defendant is confined, or, if not confined, the defendant's current address;

(4) The offenses for which the defendant was convicted and sentenced;

(5) The date on which the defendant was sentenced;

(6) Whether the defendant was convicted by a jury, by a judge without jury, or on a plea of guilty, guilty but mentally ill, or nolo contendere;

(7) The sentence imposed (probation, fine, and/or imprisonment), the length of the sentence imposed, and whether the defendant is now serving that sentence;

(8) The name of the judge who presided at trial and imposed sentence;

(9) The court, title, and file number of any proceeding (including appeals and federal court proceedings) instituted by the defendant to obtain relief from conviction or sentence, specifying whether a proceeding is pending or has been completed;

(10) The name of each lawyer who represented the defendant at any time after arrest, and the stage of the case at which each represented the defendant;

(11) The relief requested;

(12) The grounds for the relief requested;

(13) The facts supporting each ground, stated in summary form;

(14) Whether any of the grounds for the relief requested were raised before; if so, at what stage of the case, and, if not, the reasons they were not raised;

(15) Whether the defendant requests the appointment of counsel, and, if so, information necessary for the court to determine whether the defendant is entitled to appointment of counsel at public expense.

Upon request, the clerk of each court with trial level jurisdiction over felony cases shall make available blank motion forms without charge to any person desiring to file such a motion.

(D) Return of Insufficient Motion. If a motion does not substantially comply with the requirements of these rules, the court may direct that it be returned to the defendant with a statement of the reasons for its return. The clerk of the court shall retain a copy of the motion.

(E) Attachments to Motion. The defendant may attach to the motion any affidavit, document, evidence, or memorandum of law to support the relief requested.

(F) Amendment and Supplementation of Motion. The court may permit the defendant to amend or supplement the motion at any time.

(G) Successive Motions.

(1) Except as provided in subrule (G)(2), regardless of whether a defendant has previously filed a motion for relief from judgment, after August 1, 1995, one and only one motion for relief from judgment may be filed with regard to a conviction. The court shall return without filing any successive motions for relief from judgment. A defendant may not appeal the denial or rejection of a successive motion.

(2) A defendant may file a second or subsequent motion based on a retroactive change in law that occurred after the first motion for relief from judgment or a claim of new evidence that was not discovered before the first such motion. The clerk shall refer a successive motion that asserts that one of these exceptions is applicable to the judge to whom the case is assigned for a determination whether the motion is within one of the exceptions.

(Current as of 11/18/2005)

RULE 6.503 FILING AND SERVICE OF MOTION

(A) Filing; Copies.

(1) A defendant seeking relief under this subchapter must file a motion, together with two copies, with the clerk of the court in which the defendant was convicted and sentenced.

(2) Upon receipt of a motion, the clerk shall file it under the same number as the original conviction.

(B) Service. The clerk shall serve a copy of the motion and notice of its filing on the prosecuting attorney.

Unless so ordered by the court as provided in this subchapter, the filing and service of the motion does not require a response by the prosecutor.

(Current as of 11/18/2005)

RULE 6.504 ASSIGNMENT; PRELIMINARY CONSIDERATION BY JUDGE; SUMMARY DENIAL

(A) Assignment to Judge. The motion shall be presented to the judge to whom the case was assigned at the time of the defendant's conviction. If the appropriate judge is not available, the motion must be assigned to another judge in accordance with the court's procedure for the reassignment of cases.

(B) Initial Consideration by Court.

(1) The court shall promptly examine the motion, together with all the files, records, transcripts, and correspondence relating to the judgment under attack. The court may request that the prosecutor provide copies of transcripts, briefs, or other records.

(2) If it plainly appears from the face of the materials described in subrule (B)(1) that the defendant is not entitled to relief, the court shall deny the motion without directing further proceedings. The order must include a concise statement of the reasons for the denial. The clerk shall serve a copy of the order on the defendant and the prosecutor. The court may dismiss some requests for relief or grounds for relief and direct further proceedings as to others.

(3) If the motion is summarily dismissed under subrule (B)(2), the defendant may move for reconsideration of the dismissal within 21 days after the clerk serves the order. The motion must concisely state why the court's decision was based on a clear error and that a different decision must result from correction of the error. A motion which merely presents the same matters that were considered by the court will not be granted.

(4) If the entire motion is not dismissed under subrule (B)(2), the court shall order the prosecuting attorney to file a response as provided in MCR 6.506, and shall conduct further proceedings as provided in MCR 6.505-6.508.

(Current as of 11/18/2005)

RULE 6.505 RIGHT TO LEGAL ASSISTANCE

(A) Appointment of Counsel. If the defendant has requested appointment of counsel, and the court has determined that the defendant is indigent, the court may appoint counsel for the defendant at any time during the proceedings under this subchapter. Counsel must be appointed if the court directs that oral argument or an evidentiary hearing be held.

(B) Opportunity to Supplement the Motion. If the court appoints counsel to represent the defendant, it shall afford counsel 56 days to amend or supplement the motion. The court may extend the time on a showing that a necessary transcript or record is not available to counsel.

(Current as of 11/18/2005)

RULE 6.506 RESPONSE BY PROSECUTOR

(A) Contents of Response. On direction of the court pursuant to MCR 6.504(B)(4), the prosecutor shall respond in writing to the allegations in the motion. If the response refers to transcripts or briefs that are not in the court's file, the prosecutor shall submit copies of those items with the response.

(B) Filing and Service. The prosecutor shall file the response and one copy with the clerk of the court and serve one copy on the defendant.

(Current as of 11/18/2005)

RULE 6.507 EXPANSION OF RECORD

(A) Order to Expand Record. If the court does not deny the motion pursuant to MCR 6.504(B)(2), it may direct the parties to expand the record by including any additional materials it deems relevant to the decision on the merits of the motion. The expanded record may include letters, affidavits, documents, exhibits, and answers under oath to interrogatories propounded by the court.

(B) Submission to Opposing Party. Whenever a party submits items to expand the record, the party shall serve copies of the items to the opposing party. The court shall afford the opposing party an opportunity to admit or deny the correctness of the items.

(C) Authentication. The court may require the authentication of any item submitted under this rule.

(Current as of 11/18/2005)

RULE 6.508 PROCEDURE; EVIDENTIARY HEARING; DETERMINATION

(A) Procedure Generally. If the rules in this subchapter do not prescribe the applicable procedure, the court may proceed in any lawful manner. The court may apply the rules applicable to civil or criminal proceedings, as it deems appropriate.

(B) Decision Without Evidentiary Hearing. After reviewing the motion and response, the record, and the expanded record, if any, the court shall determine whether an evidentiary hearing is required. If the court decides that an evidentiary hearing is not required, it may rule on the motion or, in its discretion, afford the parties an opportunity for oral argument.

(C) Evidentiary Hearing. If the court decides that an evidentiary hearing is required, it shall schedule and conduct the hearing as promptly as practicable. At the hearing, the rules of evidence other than those with respect to privilege do not apply. The court shall assure that a verbatim record is made of the hearing.

(D) Entitlement to Relief. The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion

(1) seeks relief from a judgment of conviction and sentence that still is subject to challenge on appeal pursuant to subchapter 7.200 or subchapter 7.300;

(2) alleges grounds for relief which were decided against the defendant in a prior appeal or

proceeding under this subchapter, unless the defendant establishes that a retroactive change in the law has undermined the prior decision;

(3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates

(a) good cause for failure to raise such grounds on appeal or in the prior motion, and

(b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, "actual prejudice" means that,

(i) in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal;

(ii) in a conviction entered on a plea of guilty, guilty but mentally ill, or nolo contendere, the defect in the proceedings was such that it renders the plea an involuntary one to a degree that it would be manifestly unjust to allow the conviction to stand;

(iii) in any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case;

(iv) in the case of a challenge to the sentence, the sentence is invalid.

The court may waive the "good cause" requirement of subrule (D)(3)(a) if it concludes

that there is a significant possibility that the defendant is innocent of the crime.

(E) Ruling. The court, either orally or in writing, shall set forth in the record its findings of fact and its conclusions of law, and enter an appropriate order disposing of the motion.

(Current as of 11/18/2005)

RULE 6.509 APPEAL

(A) Availability of Appeal. Appeals from decisions under this subchapter are by application for leave to appeal to the Court of Appeals pursuant to MCR 7.205. The 12-month time limit provided by MCR 7.205(F)(3), runs from the decision under this subchapter. Nothing in this subchapter shall be construed as extending the time to appeal from the original judgment.

(B) Responsibility of Appointed Counsel. If the trial court has appointed counsel for the defendant during the proceeding, that appointment authorizes the attorney to represent the defendant in connection with an application for leave to appeal to the Court of Appeals.

(Current as of 11/18/2005)